I thought or why I thought what I did or anything." Nor did DuBois recall counsel ever asking him about any problems with the State's evidence.

Rather, admitted trial counsel, "once DuBois confirmed that everything Cryer had done was accurate and appeared to be in order, we decided at that point not to use him." Reading between the lines, the State then subpoenaed DuBois to testify *against* Richey. DuBois contacted trial counsel and asked for his help in resisting the subpoena, but he received none. According to DuBois, he was told by Richey's counsel that "I'll [DuBois] just have to do what I have to do." Consequently, Richey's sole forensic expert testified at Richey's trial against him, acknowledging that he found nothing wrong with the State's conclusions. Trial counsel neither cross-examined DuBois nor presented any other scientific evidence.

When informed, following trial, about the full extent to which the carpet had been diverted prior to arriving at the State Arson Lab, DuBois responded that "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial. "When asked whether this information would have affected his acquiescence to the State's scientific conclusions, DuBois remarked that:

> I don't know if I knew that at the time I did this investigation. And it raises a problem with spoilation of this evidence. I'm having trouble right now telling you whether or not that changes my opinion or affects it.
>
> I'm looking - I looked at this fire and I looked at a lot of things together in reaching my conclusion about this fire. And if you take out a piece of this puzzle, then I would have to re-evaluate what's left about this fire.

The panel found Richey guilty on all counts (except involuntary manslaughter, which was a lesser alternative to aggravated felony murder), including aggravated felony-murder. At the death penalty sentencing hearing, Richey presented an array of evidence about his background and upbringing. He had received his first mental evaluation at age thirteen, and had been repeatedly treated at mental institutions. A psychologist testified that Richey suffers from a borderline personality disorder and antisocial personality disorder, and that he functions at the emotional level of a ten- or eleven-year-old. A social worker testified that Richey suffers from "histrionic behavior disorder."

The panel unanimously sentenced Richey to death. It concluded that "Richey purposely and with specific intent caused the death of Cynthia Collins" and disagreed that mitigation was warranted by Richey's attempt to save her. Instead, the panel opined that "this final contention of the defendant was immediately disposed of when placed in juxtaposition to the unrefuted evidence that the defendant pulled the fire alarm from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise."

The "unrefuted" evidence supporting the panel's conclusion that Richey had pulled the fire alarm--which even the State did not argue--was the testimony of Cryer, who noted that he saw the smoke detector hanging from the ceiling by its wires, eight inches below the ceiling, when he arrived at the apartment the morning after the fire. (At trial, Hope Collins testified to her belief that the smoke detector had been connected and functioning in the hours prior to the fire.)

On direct appeal, Richey was represented by counsel from the Ohio Public Defender Commission. After he

reviewed the trial record, appellate counsel discussed the appealable issues with his supervisor, and expressed his view that trial counsel's "representation of Mr. Richey had been markedly deficient and that the deficiencies had severely prejudiced Mr. Richey's defense." According to appellate counsel:

> [My supervisor], who is a personal friend of [trial counsel], listened to my views regarding the prejudicial deficiencies of [trial counsel's] representation of Mr. Richey, and responded by saying that I should do the best job I could without raising the ineffective assistance of trial counsel issues. [My supervisor] did not tell me that the ineffectiveness arguments I wanted to make lacked merit. He simply told me not to make them . . . . [he] left me with no doubt that if I were to push on the ineffective assistance of counsel issues, he would not be pleased and my job rating would suffer. This was not the first time [my supervisor] had directed me and others in our office not to raise ineffectiveness issues in a brief. On an earlier occasion I had to sneak into the office after hours to put an ineffective assistance of counsel argument back in a direct appellate brief after [my supervisor] had taken it out.

Yet appellate counsel averred that "the errors made by [trial counsel] were too egregious to be completely ignored. Therefore, I raised ineffective assistance of trial counsel as an appellate issue. . . but did so in a relatively weak fashion so that I would not have too severe a confrontation with [my supervisor]. Furthermore, I did not raise many of the specific instances of trial counsel's ineffectiveness that I had noted in reviewing the record, and did not research what I regarded as

other potentially meritorious ineffective assistance of counsel arguments."

The Ohio Court of Appeals affirmed Richey's conviction and sentence. *State v. Richey*, 1989 WL 156561 (Ohio Ct. App. Dec. 28, 1989); *State v. Richey*, 1989 WL 156562 (Ohio Ct. App. Dec.28, 1989). By a vote of four to three, the Ohio Supreme Court affirmed. *State v. Richey*, 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915 (Ohio 1992), *rehearing denied* 65 Ohio St. 3d 1421, 598 N.E.2d 1172 (table). The U.S. Supreme Court denied certiorari. *Richey v. Ohio*, 507 U.S. 989, 123 L. Ed. 2d 157, 113 S. Ct. 1592 (1993), *rehearing denied*, 508 U.S. 934, 124 L. Ed. 2d 303.

At this point Richey retained new counsel, who uncovered new evidence and retained new scientific experts. Counsel submitted an affidavit from Villearreal, who recanted her trial testimony, claiming that "I never heard Kenny Richey say anything about burning 'A Building' or about using Marine Corps tactics to burn the building. I don't recall exactly what I said at [Richey]'s trial, but if I said anything about [Richey] threatening to burn A Building or about using Marine Corps tactics, I was wrong." Villearreal further averred that during and after the party, Richey "was at ease, having fun and enjoying himself. He was not angry about anything[, and] expressed no anger toward Candy Barchet, Mike Nichols or anybody else."

Villearreal also contended that Cynthia "was always into everything, including matches and lighters. Sometimes when Hope and I would be drinking coffee and smoking cigarettes, Cynthia would grab our lighters and run into her bedroom." Villearreal detailed a number of incidents in which Cynthia's action failed to comport with basic fire safety, including one in which Cynthia placed a lit cigarette between sofa cushions, and also averred that according to Hope, Cynthia had twice set fire to their beds, using, respectively, a curling iron and a

cigarette lighter. Villearreal also declared that she ate dinner at Collins's apartment the night of the fire, and that the smoke alarm was "hanging loose." Indeed, noted Villearreal, "Hope's smoke detector was almost always unhooked. It was very sensitive and would go off when we were just smoking cigarettes or even when just the oven was on. So Hope used to keep it unhooked."

According to Villearreal, her knowledge of these circumstances was no mystery to either the prosecutor or Richey's trial counsel. Specifically, Villearreal averred that "before Richey's trial for arson and murder, [she] spoke to [his] lawyer . . . about Cynthia Collins' playing with fire. "Villearreal expressed surprise that during Richey's trial, "no one asked me any questions about Cynthia's playing with fire." As for the prosecutor, Villearreal stated that she "also spoke with the prosecuting attorney . . . before [Richey]'s trial. I probably also told him about Cynthia's playing with fire but I don't specifically recall."

Richey's new forensic experts both castigated the State's scientific conclusions and surmised that DuBois' accession to them amounted to professional incompetence. Richard Custer, a specialist in fire reconstruction, testified that - even in 1986, when the State tested the samples - Cryer's conclusions were based on "unsound scientific principles." First, Custer opined that the burn pattern could also have resulted from a fire that occurred naturally, and that Cryer's theory of the accelerant's pour pattern and location would have required the use of ten gallons of fuel. Second, Custer testified that the irregular burn patterns on the deck - which Cryer believed indicated that accelerants were used - were caused simply by intense radiation. Indeed, elaborated Custer, whether or not an accelerant had been used, the fire would have spread downward, and any evidence of accelerant in the gaps would have been destroyed by the fire itself. Third, Custer discounted Cryer's belief that accelerant

use was evinced by the fire's speed, noting that rapidly spreading fires are common in residences with modern furnishings and room sizes. Finally, Custer dismissed Cryer's explanation for the state of the smoke detector - that it had been dislodged prior to the apartment's ignition - as speculative. Custer noted that the high temperature around the ceiling could easily have dislodged even a smoke detector that was mounted.

Custer concluded that the fire scene reflected an accidentally set fire that experienced "flashover"--a possible collateral consequence of the fire's radiated heat causing additional objects to combust. Custer produced three computer models detailing how the fire would have progressed had it spread accelerant-free, and determined that flashover would have occurred in the two most likely scenarios. Moreover, based on his knowledge of Hope Collins's smoking habits at the time, photographs that showed the presence of alcoholic beverages and smoking paraphernalia on the evening of the fire, and the fact that Collins and some of her friends had been using marijuana that evening, Custer concluded that the fire was likely caused by a carelessly discarded cigarette that had smoldered, for several hours, between the cushions of the living room couch.

Andrew Armstrong, Ph.D., a chemist and forensic scientist, echoed Custer's conclusions. Reviewing the State's raw data - and also applying what he believed to be contemporaneous scientific standards - Armstrong concluded that "there is no evidence of an identifiable ignitable liquid in any of the samples from the fire scene." The sample of wood obtained from the balcony revealed no paint thinner; the chromatogram from the sample did not "even look close" to the pattern associated with paint thinner, and instead revealed only turpentine, which occurs naturally in the type of wood used to construct patios. The pattern purportedly revealing

paint thinner in the carpet, opined Armstrong, did not conclusively indicate paint thinner, as it was also consistent with common household products such as furniture polish or insecticide. Moreover, although the State concluded that both of the aforementioned samples contained paint thinner, Armstrong testified that the two samples did not even reveal the same substance.

Armstrong also testified that the carpet sample which the State concluded contained gasoline lacked the "five peak component" pattern indicative of gasoline. Although acknowledging that the ASTM had yet to adopt the "five peak" standard in 1986, Armstrong testified that he and other experts employing gas chromatography knew of and relied upon the standard at that time. Noted Armstrong, "Many carpet samples that have been exposed to fire conditions contain [the compounds identified by the State Arson Lab] in some concentration." Armstrong stressed that only the "five peak" standard can eliminate false positives, and that "the elimination of false positives is of utmost importance." To the extent that the carpet did reveal gasoline, elaborated Armstrong, it would have been gasoline that had evaporated, and it would have been impossible to determine when the gasoline had reached the carpet. Armstrong agreed that the carpet could have absorbed gasoline from the parking lot - which, recall, was located near gasoline pumps - on which the carpet had rested for three weeks. Finally, Armstrong touched on a broader problem with the State's methodology that undermined its conclusions: no control samples had been compared with the tainted ones.

In April 1994, Richey moved to reopen his appeal, arguing that he lacked the effective assistance of appellate counsel. His motion was denied by the court of appeals, which was affirmed by the Ohio Supreme Court. *See State v. Richey*, 73 Ohio St. 3d 523, 1995 Ohio 329, 653 N.E.2d 344 (Ohio 1995). Richey's petition for postconviction relief was

denied by the trial and appellate courts, *State v. Richey*, 1997 WL 722782 (Ohio Ct. App. Nov. 18, 1997), and denied review by the Ohio Supreme Court, *State v. Richey*, 81 Ohio St. 3d 1467, 690 N.E.2d 1287 (Ohio Mar. 11, 1998) (table). Richey's second state postconviction petition was similarly denied by the trial and appellate courts, *State v. Richey*, 2000 WL 681642 (Ohio Ct. App. May 26, 2000), and further review was again denied by the Ohio Supreme Court, *State v. Richey*, 90 Ohio St. 3d 1427, 736 N.E.2d 25 (Ohio Oct. 4, 2000) (table).

Advancing to federal district court, Richey filed a petition for a writ of habeas corpus, alleging that both his conviction and sentence were tainted by constitutional errors. The district court denied Richey's petition. Although it refused to conduct an evidentiary hearing, the district court cited, in defense of the State's forensic conclusions, an extra-record article written by forensic scientist Anthony Cafe. Cafe has subsequently averred that the district court "miscited and misunderstood my published articles" and that "most of the world's leading forensic scientists in this field would be horrified if they saw the chromatograms used to convict Kenny Richey." Cafe warned that "if Kenny Richey were executed on the basis of this scientific evidence, then these chromatograms will become historical documents, examined by scientists all over the world and used to show just how wrong forensic evidence can be."

The district court certified for appellate review eight of Richey's grounds for relief. Richey timely appealed, and we added three claims to the certificate of appealability. Included in the certificate of appealability is the question of whether there was insufficient evidence to convict Richey of the crimes with which he was charged or tried, as well as whether he suffered ineffective assistance of counsel.

## II. ANALYSIS

We apply the familiar habeas rules. Because Richey's petition was filed after April 24, 1996, it falls under the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). AEDPA requires that we respect any determination made by the state court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §§ 2254(d)(1)-(2); *see also Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). Within these constraints, we review the district court's legal conclusions *de novo*, but we may upset its factual determinations only if they were clearly erroneous. *Lott v. Coyle*, 261 F.3d 594, 606 (6th Cir. 2001).

### A. Sufficiency of the Evidence

The heart of the prosecution against Richey - and the basis for his death sentence - was that he committed aggravated felony murder, which is prohibited by Ohio Revised Code § 2903.01. Richey argues that to convict a person of aggravated felony murder under the statute, the State is required to prove that the defendant intended to kill the person who actually died (in this case, Cynthia Collins), but that here, the State introduced no evidence that Richey actually intended to kill Cynthia. The State disputes this argument on the merits, and also urges that the claim has been procedurally defaulted. Because a discussion of the procedural default in this case requires an understanding of the merits, we will discuss the merits of the claim first.

1. Merits

The district court rejected Richey's statutory argument, ruling that "this claim is not cognizable in a federal habeas court as it is one touching purely on state law." In so holding, the district court misunderstood Richey's claim. According to *Fiore v. White*, 531 U.S. 225, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001), the federal constitution's Due Process Clause "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 228-29. Therefore, the state law question regarding the elements of the crime predicates the enforcement of Richey's federal constitutional right. Thus, we must first look to state law to determine whether the State was required to prove, as an element of the crime, that Richey intended to kill the victim.

a. Elements of Aggravated Felony Murder

At the time of the fire, the statute at issue provided:

> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated arson or arson . . . .
>
> ***
>
> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred . . . to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or

> attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person *specifically intended to cause the death of the person killed*, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

O.R.C. § 2903.01 (law effective prior to July 1996) (emphasis added).

Although subsection B, the felony murder section of the statute, mandates no nexus between the specific intent of the arsonist and the identity of the victim, subsection D, which informs the intent required under subsection B, mandates that the jury be instructed to consider whether the defendant "specifically intended to cause the death of *the person* killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." O.R.C. § 2903.01(D) (emphasis added). The plain meaning is unmistakable: according to the statutory text, the defendant must have killed the person that he actually intended to kill.

Indeed, Ohio courts have interpreted subsection D of the statute in this exact way. In *State v. Maurer*, 15 Ohio St. 3d 239, 15 Ohio B. 379, 473 N.E.2d 768 (Ohio 1984), the court upheld an aggravated felony murder conviction under subsection D because the judge instructed the jury that it had to find beyond a reasonable doubt that not only did the defendant kill the victim in the course of a felony (a kidnapping), but also that "there was present in the mind of

the defendant a specific intention to kill Dawn Marie Hendershot," the person whom the defendant was charged with killing. *Id.* at 779; *see State v. Brewer*, 1984 Ohio App. LEXIS 10435, at *5, 1984 WL 6695 at *3 (Ohio Ct. App. July 18, 1984) (affirming conviction where the jury was instructed to determine "whether defendant specifically intended to cause Tewksbury's death," where Tewksbury was the person killed); *State v. Grant*, 67 Ohio St. 3d 465, 1993 Ohio 171, 620 N.E.2d 50, 62 (Ohio 1993) (upholding an aggravated felony murder conviction where the defendant "burned down an occupied home, known to contain children, in order to kill *the children*") (emphasis added); *see also Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir. 1982) ("Ohio has left the company of those jurisdictions which have traditional 'felony murder' offenses. . . . under Ohio law . . . purpose to kill is an essential element of the crime of aggravated murder."). n1

> n1 It is noteworthy that Ohio also has a separate felony murder statute under which defendants are not eligible for a death penalty specification. *See* OHIO REV. CODE ANN. § 2903.02(B). Richey was not convicted under this statute.

The State argues, however, that subsection D has no bearing on the elements of aggravated felony murder, and "does not require the State to do anything--it concerns jury instructions." This argument is curious, to say the least. First, it is clear from the statute and case law that the State is required to do something: it is required to prove the element of specific intent. Second, there is no meaningful difference between requiring the State to do something and requiring that the jury be informed that the State is required to do something. While the second formulation requires more words to articulate, its practical effect is identical. Nor is it

fathomable, as the State suggests, that Ohio's General Assembly intended to require specific intent when the defendant was tried by a jury, but not when the defendant was tried by a panel of judges. Such a reading would mean that the elements of the crime can change depending upon who the fact-finder is. n2 Because such a dichotomy would be unconstitutionally irrational, we are unable to embrace the State's interpretation. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) (noting that statutes should be interpreted to avoid unconstitutional results). Consequently, in order to convict a defendant of the crime of aggravated felony murder in Ohio, the State must prove that the defendant specifically intended to kill the victim.

> n2 Richey correctly argues that were there truly a distinction in Ohio law between the elements that must be proven before a jury and those that must be proven before a panel of judges, trial counsel would have been obviously ineffective in advising Richey to bypass a jury, and with it the extra element that the State could not satisfy.

Not only does subsection D provide for the specific intent requirement, it provides for the one way that the State can more easily satisfy this requirement. The statute creates the possibility of a permissive inference by a jury, whereby the jury can infer from the circumstances of the felony, that the defendant intended to cause the death of the person actually killed. OHIO REV. CODE ANN. § 2903.01(D). The statute makes clear, however, that this inference is not conclusive, and that the jury must consider all the evidence on both sides, including any evidence presented by the defendant "to indicate his lack of intent in determining whether the

[defendant] specifically intended to cause the death of the person killed. . ." *Id.* Although the statute details a less onerous means by which the State can prove the specific intent of a defendant to kill the actual victim, even in this circumstance, the statute does not change the substance of what the State must prove: that the defendant intended to kill the very person who actually died. *See State v. Brewer*, 1984 Ohio App. LEXIS 10435, at *5, 1984 WL 6695, at *3 (Ohio Ct. App.).

b. Transferred Intent

In Richey's case, the State presented no evidence that he specifically intended to kill Cynthia Collins, and in fact conceded this point during oral argument before the state court. Instead, the State presented evidence that Richey had a motive to kill Candy Barchet and/or Mike Nichols, and thus, the State assumed that the doctrine of transferred intent could be used to find that Richey specifically intended to kill Cynthia. n3

> n3 The State relied solely on this theory of transferred intent to meet its statutory burden, and this approach in Richey's case dates back to the Bill of Particulars, where its stated, regarding Count One of the indictment that, "the purpose to cause the death of another, to-wit: Cynthia Collins arises from the intent of the Defendant to cause the death of Candy Barchet and/or Mike Nichols."

Because nothing in the language of O.R. C. § 2903.01 supports the idea that the Ohio General Assembly affirmatively intended for transferred intent to apply to aggravated felony murder, the State's sole argument would be that the doctrine of transferred intent, derived from the common law, applies to all intent crimes. However, the plain

text of O.R.C. § 2903.01(D) indicates that the statute not only fails to affirmatively permit transferred intent, it actually precludes it.

First, as previously stated, subsection D already specifies the single way in which the State is permitted to utilize a more flexible approach to proving specific intent: the permissible inference. Thus it would be overreaching for this Court to read into the statute another flexible approach, such as transferred intent. Second, as a general rule of statutory construction, every word has a meaning, and the courts should not render statutory language superfluous. *Hibbs v. Winn*, 542 U.S. 88, 159 L. Ed. 2d 172, 124 S. Ct. 2276, 2286 (2004); *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002 Ohio 4172, 773 N.E.2d 536, 543 (Ohio 2002). In this case, the State urges us to construe the phrase "intended to cause the death of the person killed" to mean "intended to cause the death of another." The difference in meaning is profound, and it is worth noting that the Ohio General Assembly has actually used the phrase "death of another" in another statute: its traditional felony murder statute. *See* OHIO REV. CODE ANN. § 2903.02(B) (stating that "no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offence of violence that is a felony"). The fact that similar language was not used in this statute appears purposeful, suggesting that Ohio chose to use a heightened intent requirement here, to make aggravated felony murder deserving of the death penalty.

Fortunately, we need not go so far as to interpret Ohio's statutory language to determine whether the law permitted transferred intent in aggravated felony murder cases. The Ohio courts themselves offered insight on this issue. At the outset, the assumption that the doctrine of transferred intent broadly overlays all intent crimes is incorrect. "Ohio courts have noted that the state legislature is aware of the doctrine

of transferred intent at times applying the doctrine and other times refusing to apply the doctrine to a statute." *In re A.C.T.*, 158 Ohio App. 3d 473, 2004 Ohio 4935, 816 N.E.2d 1098, 1100 (Ohio Ct.App. 2004). Although there have not been many judicial pronouncements on the narrow issue of applying transferred intent to aggravated felony murder, all the cases that directly touch upon it suggest that the doctrine is inapplicable here. In *State v. Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294 (Ohio 1988), the defendant relied on OHIO REV. CODE ANN. § 2903.01(D) to argue that transferred intent could not support his conviction for aggravated (non-felony) murder under § 2903.01(A). In rejecting his argument, the Ohio Supreme Court drew a distinction between the two subsections' treatment of transferred intent, such that subsection D could not be read to vitiate the incorporation of transferred intent in subsection A. *See id.* at 1305. In so doing, the court explicitly limited its application of transferred intent to cases of aggravated murder, not aggravated felony murder. *See id.* This suggests that the doctrine of transferred intent did not apply to subsection D, and at the very least, makes clear that the doctrine of transferred intent is not so over-arching as to be automatically applicable in proving all intent crimes. One Ohio court has gone further to state that:

> The doctrine [of transferred intent] has been applied for many years in Ohio but has apparently been removed by the legislature from application in aggravated murder cases. In revising R.C. 2903.01(D), the legislature [enacted the text at issue]. . . The legislature did *not* remove the doctrine of transferred intent from application in determining the absence or presence of purpose to kill in murder, as opposed to aggravated murder, convictions. The limitation of the legislative reference to

> aggravated murder implies to a point that the legislature intended for the doctrine of transferred intent to have applicability in situations involving lesser crimes such as murder.

*State v. Mullins*, 76 Ohio App. 3d 633, 602 N.E.2d 769, 771 (Ohio Ct. App. Feb. 4, 1992) (upholding a murder conviction based on transferred intent where the defendant, though was initially indicted on a charge of aggravated murder, was actually found guilty by the jury on a charge of non-aggravated murder). n4 The preceding state case law - and it is the only Ohio case law at the time that squarely addressed this issue - indicates that transferred intent does not apply to subsection D of the aggravated felony murder statute. Accordingly, in determining what the required elements of aggravated felony murder were under OHIO REV. CODE ANN. § 2903.01, we are compelled to adhere to Ohio's specific pronouncements at the time of Richey's conviction and state appeals. Therefore, because the State chose to prosecute Richey for aggravated felony murder (subsection B and D) of the statute, rather than straight aggravated murder (subsection A), the State had to prove, as an element of the crime, that Richey intended to kill Cynthia Collins.

> n4 The court's statement was quite broad, seeming not to make the distinction between aggravated murder and aggravated felony murder that the *Sowell* Court did. However, this distinction was not relevant for the *Mullins* Court's decision because it focused primarily on the difference between murder and aggravated murder.

The State does not address the aforementioned case law head-on. Instead, the State claims that the case law was

addressed and disposed of by the Ohio Supreme Court. Thus, the State turns a blind eye to the status of the law at the time of Richey's conviction and the filing of his appeal; n5 it instead relies on the Ohio Supreme Court's pronouncement in Richey's case to support its interpretation of what elements it needed to prove.

n5 In affirmative support of its position, the State does point to *State v. Phillips*, 74 Ohio St. 3d 72, 1995 Ohio 171, 656 N.E.2d 643 (Ohio 1995), and *State v. Coleman*, 37 Ohio St. 3d 286, 525 N.E.2d 792 (Ohio 1988) to show that subsection D is only applicable when a judge instructs a jury, and that therefore in Richey's case, where there was no jury, transferred intent was applicable. These cases do not support the State's proposition. In *Phillips*, the issue was whether the jury received proper instructions in an aggravated felony murder case. The defendant claimed that the jury should have been instructed that any inference that it made regarding specific intent was permissive, not conclusive. 656 N.E.2d at 668. The court determined that its more general instructions were sufficient, because the State never opted to use the permissive inference in subsection D, the jury was never told that it could make an inference, and therefore an instruction regarding the inference was unnecessary. *Id. Phillips* is not about transferred intent, and it simply does not speak to whether transferred intent can be used in aggravated felony murder cases. The same is true in *Coleman*, where the court determined that jury instructions comported with subsection D because they conveyed to the jury that any inference of specific intent that was drawn from the nature of the crime was nonconclusive. 525 N.E.2d at 796. The cases cited by the State do not impact the decision before us in any

> way, they simply expound upon the permissive inference in subsection D, which neither party even suggests was used in Richey's case.

First, it is unclear if the issue of transferred intent as applied to subsection D of the statute was truly decided by the Ohio Supreme Court. The State points to a portion of the court's opinion entitled "Sufficiency of the Evidence," where the Ohio Supreme Court explains why there was sufficient proof that Richey was the arsonist. *State v. Richey*, 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915, 924 (Ohio 1992). Although this section addressed many issues, the court stated that, "The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility." *Id.* at 925. The court then proclaimed that "transferred intent is firmly rooted in Ohio law." Critically, it cited only cases addressing subsection A of the statute-cases dealing with aggravated murder and not aggravated felony murder, for which Richey was convicted.

However, even assuming that the Ohio Supreme Court's brief statement in Richey's case was meant to interpret the aggravated felony murder statute, n6 that court, although it has the ultimate authority in interpreting state law, would have been offering a novel, or at least unforeseen, interpretation of the statute. Prior to the holding in Richey's case, both the text of the statute and its treatment by the Ohio courts strongly indicated that transferred intent could not be applied to aggravated felony murder. We have not found a single Ohio case where transferred intent was applied and upheld where the defendant was charged with aggravated felony murder, whereas the language in *Sowell* and *Mullins* suggests the contrary. Thus, under the State's interpretation of the Ohio Supreme Court's opinion, the court would have been expanding what at the time was the known scope of the

statute, raising what the United States Supreme Court has described as a most serious due process concern: "that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 351, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

> n6 It should be noted that we certified the statutory question regarding transferred intent to the Ohio Supreme Court, which declined to answer this question.

It is well settled that the government cannot establish the sufficiency of the evidence by resorting to an unforeseeable judicial construction of a criminal statute. The Supreme Court in *United States v. Lanier*, 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997), n7 stated what it deemed to be the three manifestations of the fair warning requirement:

> First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second . . . the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the

> statute nor any prior judicial decision has fairly disclosed to be within its scope.

*Id.* at 266 (internal citations and quotations omitted). *See Gall v. Parker*, 231 F.3d 265, 305-06 (6th Cir. 2001) (granting writ of habeas corpus upon holding that elimination of an element of a crime, or altering the necessary proof by the state supreme court violated Due Process Clause when both the plain text of the statute and prior state court decisions instructed otherwise; *see also Rabe v. Washington*, 405 U.S. 313, 316, 31 L. Ed. 2d 258, 92 S. Ct. 993 (1972) (reversing as violative of the Due Process Clause a state law conviction that rested on unforeseeable judicial interpretation of a criminal statute).

> n7 The *Lanier* Court noted that in order to satisfy the fair warning requirement, there need not be a court pronouncement applying the rule in a case with facts "fundamentally similar" to the one at bar. 520 U.S. at 268. However, in Richey's case, although there was certainly no Ohio case definitively reading transferred intent into subsection D, there were strong indications that it was to be read out of subsection D.

Accordingly, if the Ohio Supreme Court deliberated on, and decided the issue presented before us now, it would have been a novel interpretation of the statute, because the plain meaning and the court pronouncements in *Sowell* and *Mullins* indicated the opposite of what the State now urges. Prior to Richey's appeal before the Ohio Supreme Court, an Ohio appeals court (*Mullins*) actually cited to subsection D of the aggravated felony murder statute as an example of an instance where the Ohio General Assembly read *out* of a statute the transferred intent doctrine. Furthermore, to the

extent that the statute is ambiguous, the rule of lenity ensures that the requirement of fair warning is met by resolving doubts in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). Although the Ohio Supreme Court is the ultimate arbiter of the State's laws, the fact that the law prior to Richey's final state appeal points to an interpretation of the statute without transferred intent raises serious due process concerns of retroactivity and notice. It must be said that this Court cannot decide what Ohio law should be, and that the Ohio Supreme Court could certainly decide that transferred intent was meant to apply to subsection D of the statute, were its decision to be made in a vacuum. However, because there was not a single judicial pronouncement suggesting that transferred intent could be used under subsection D, and because the prior case law affirmatively indicates to the contrary, the Ohio Supreme Court would have raised a federal constitutional concern of impermissible retroactivity, had it authoritatively read transferred intent into subsection D. Therefore, if we accept the State's interpretation of the Ohio Supreme Court's opinion as having done this, it would have been a retroactive or novel application of a statute which would have violated Richey's clearly established rights under the Due Process Clause.

The State could point to no Ohio law, prior to Richey's own case, that stands for the proposition that transferred intent applies in aggravated felony murder cases. Thus, in compliance with Ohio law, we must find that the State could not apply transferred intent in order to satisfy the specific intent requirement in an aggravated felony murder case. Whether or not the Ohio Supreme Court reached the issue of transferred intent as applied to subsection D, the State did not meet its burden of proving all the required elements of aggravated felony murder. Based on the state of the law at the time of his actions, the only way that Richey could have

been constitutionally convicted of aggravated felony murder would have been upon a showing that Richey intended to kill the person that actually died. Because it is undisputed that there was no evidence to this effect, Richey's conviction necessarily lacked the support of sufficient evidence.

2. Procedural Default

Aside from the merits, the State argues that Richey has defaulted this claim because he failed to press this argument during his direct appeal. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). Richey concedes that he did not raise the claim at trial or on direct appeal, as he was required to by Ohio rules.

The first problem with the State's argument that the claim was defaulted is the question whether the state courts actually relied on an independent ground to deny Richey relief on this claim. The ground is independent "only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996). In other words, a lapsed claim survives if the state court overlooked the default and decided the claim anyway. *See Warden v. Hayden*, 387 U.S. 294, 297 n.3, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). Thus, if, as the State contends, the Ohio Supreme Court did decide Richey's claim regarding transferred intent, this Court is free to review the claim without concern regarding the procedural bar. While we express doubt regarding whether the Ohio Supreme Court

truly considered transferred intent as applied to subsection D of the statute, it is clear that the Ohio Supreme Court considered the issue of transferred intent generally with regards to Richey's case. The court stated that "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *Richey*, 595 N.E.2d at 925 (internal quotations omitted). Moreover, at no point did the Ohio Supreme Court hold, or even intimate, that Richey had forfeited the chance to contest the sufficiency of the evidence supporting his conviction. Because the United States Supreme Court requires a "'plain statement' that a [state court] decision rests upon an adequate an independent state ground[]," *Michigan v. Long*, 463 U.S. 1032, 1042, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), we must interpret this ambiguity to mean that the Ohio Supreme Court reached the issue of transferred intent. Therefore, there was no independent state ground barring our review.

Additionally, Richey argues that the ineffective assistance of his trial and appellate counsel supplies the cause needed to excuse his procedural default. Indeed, "ineffective assistance of counsel can supply the cause that, together with prejudice, would excuse a procedural default." *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). To demonstrate cause for the procedural default, Richey must show that both his trial and appellate counsel were ineffective. He must demonstrate that trial counsel was ineffective for failing to challenge the sufficiency of the evidence, and he must establish that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to challenge the sufficiency of the evidence. Whether appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel (predicated on trial counsel's failure to challenge the sufficiency of the evidence) turns, of course, on whether appellate counsel would have been ineffective,

absent the default below, for failing to challenge the sufficiency of the evidence. To convince us that his counsel was ineffective, Richey must demonstrate that: (1) counsel's performance was deficient; and (2) that the deficiency produced prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Richey encounters a threshold hurdle in asserting the ineffectiveness of his appellate counsel: he may not rely on ineffective assistance as cause to excuse the procedural default of his transferred intent/sufficiency of the evidence claim, if the ineffectiveness assistance claim is itself procedurally defaulted. Ohio Rule of Appellate Procedure 26(B) provides that "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed . . .within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Richey's motion to reopen his appeal in the Ohio courts--in which he asserted that his appellate counsel was deficient--was untimely, and the Ohio Supreme Court denied the motion as untimely. *See Richey*, 653 N.E.2d at 345. The question remains, however, whether the rule was an "adequate" basis to preclude federal relief. "[A] rule is adequate if it is regularly or consistently applied by the state court[.]" *White v. Schotten*, 201 F.3d 743, 751 (6th Cir. 2000). Richey argues that the rule does not fall within this criterion because it provides no definition of what constitutes "good cause" for an untimely filing and because the Ohio courts had neither articulated meaningful standards nor consistently applied any type of criteria.

The district court below held that Richey had not defaulted his ineffective assistance claim because "certainly as of the date [that] Richey filed his Rule 26(B) application, the 'good cause' rule had not yet been applied with the

regularity necessary to constitute an adequate and independent state procedural rule." *See also Anderson v. Attorney General*, 342 F.3d 1140 (10th Cir. 2003) ("State procedural rules that bar ineffective assistance of counsel claims are further reviewed with a healthy degree of skepticism.") (internal quotations omitted); *Page v. Frank*, 343 F.3d 901, 909 (7th Cir. 2003) (same).

We agree with the district court below. We measure whether Rule 26(B) was "firmly established and regularly followed by the time as of which it [was] to be applied." *Ford v. Georgia*, 498 U.S. 411, 423-24, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991) (quotations omitted). Although we did not decide this question directly in *White*, we did observe that "the state courts have not achieved consensus on what constitutes 'good cause' to excuse non-compliance with Rule 26(B)." *Id.* at 751. This was certainly true at, and even after, the time when Richey was required to file his motion to reopen under 26(B). *Cf. Mitchell v. Mason*, 325 F.3d 732, 739 (6th Cir. 2003) ("It is the Warden's burden to demonstrate that the rule was *already* firmly established and regularly followed as of the time the state court invoked the rule."). In some instances, the Ohio courts failed to excuse the most minor of violations caused by circumstances beyond the control of both the litigant and his lawyer. *See, e.g., State v. Winstead*, 74 Ohio St. 3d 277, 1996 Ohio 52, 658 N.E.2d 722 (Ohio 1996) (finding no good cause for a filing that was one day late, and that had resulted "because the overnight courier that appellant's counsel had used failed to deliver the application before the deadline for filing expired"). In other cases, the courts found good cause for significant violations even when no explanation whatsoever was provided by the litigant, solely because the litigant was proceeding *pro se*. *See, e.g., State v. Nitenson*, 1994 Ohio App. LEXIS 827, 1994 WL 69894 (Ohio Ct. App. Feb. 24, 1994) (finding good cause "in the interests of justice" even though "application

was filed more than one year after we journalized our affirmation of his conviction and he gives no sworn statements whatsoever in his application"). Nor were these inconsistent cases outliers in an otherwise consistent application of 26(B). *Compare, e.g.*, *State v. McCarter*, 1993 WL 107800 (Ohio Ct. App. Aug. 12, 1993); *State v. Klein*, No. 49260 (Ohio Ct. App. March 15, 1994); *with State v. Wright*, 1994 Ohio App. LEXIS 3374, 1994 WL 398805 (Ohio Ct. App. July 29, 1994); *State v. Fields*, No. 95 CA-08-048 (Ohio Ct. App. April 21, 1994). Thus, we find that Richey's challenge to the effectiveness of his appellate counsel is preserved. n8

> n8 Because we find that Rule 26(B) did not, in Richey's case, constitute an adequate state ground to deny his claims of ineffective assistance of appellate counsel, we do not reach the question whether ineffective assistance of appellate counsel could itself serve as the "cause" to excuse Richey's failure to comply with Rule 26(B). In *White v. Schotten*, 201 F.3d 743, 752-53 (6th Cir. 2000), we held that the 26(B) proceedings constituted part of the direct appeal - during which a defendant is constitutionally entitled to counsel - such that ineffective assistance of appellate counsel could serve as cause to excuse noncompliance with Rule 26(B). Although our decision in *Lopez v. Wilson*, 355 F.3d 931, 937-38 (6th Cir. 2004), cast doubt on whether *White*'s holding would survive the more deferential standard of review required by AEDPA, *Lopez* has since been vacated and *en banc* review is still pending. *See Lopez v. Wilson*, 366 F.3d 430 (6th Cir. 2004).

We now turn to the merits of Richey's ineffective assistance of counsel claim as an excuse for his procedural

default. The deficiency of Richey's trial and appellate counsel stems from the same shortcoming: that they failed to grasp that the State did not prove (and, indeed, had not even attempted to prove) that Richey specifically intended to cause the death of Cynthia Collins, as was required by the aggravated felony murder statute.

The failure to understand the elements of the charged offenses and hold the State to proving those elements is among the most basic responsibilities of competent counsel. "At the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto." *Scarpa v. DuBois*, 38 F.3d 1, 10 (1st Cir. 1994). The circumstances of Richey's case magnified counsel's obligation to understand the elements, because his conviction of aggravated felony murder subjected him not just to imprisonment, but to execution.

It would be one thing if counsel had failed to grasp a subtle question of statutory interpretation or had failed to raise an issue that would have been uncovered by only the most astute of jurists. However, as we explained above, at the time of Richey's trial and appeal - not the time of the Ohio Supreme Court's ruling - both the plain text of the Ohio Code and the judicial decisions interpreting it indicated that aggravated felony murder required specific intent, and that the doctrine of transferred intent was unavailable to the State. *See Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) ("Where, as here, an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that the Constitution demands."). Indeed, we have held that counsel can even be ineffective for failing to raise a legal claim that turns on an unresolved question of law, so long as counsel is aware that an unresolved issue exists. *See Combs v. Coyle*, 205 F.3d

269, 286 (6thCir. 2000) (resolving circuit split in defendant's favor, and then holding that counsel's failure to raise the objection was deficient because he "should have realized that the [practice at issue] was at least constitutionally suspect" -- as a result, "counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such a failure" ); *see also United States v. Bass*, 310 F.3d 321, 327-30 (5th Cir. 2002) (finding that appellate counsel was ineffective for failing to challenge sufficiency on direct appeal when defendant's conduct fell outside the statute). It follows with even greater force that when both text and precedent compelled the conclusion, and the conclusion would have gutted, as a matter of law, the primary charge and death sentence, counsel was deficient for failing to raise it.

Having established that both trial and appellate counsel were deficient, Richey must also demonstrate prejudice, a showing which is straightforward in this case. Because we have already determined that specific intent was clearly a requirement and the State failed to meet this requirement, Richey has demonstrated the necessary prejudice from the claimed violation of federal law. By failing to challenge the sufficiency of the evidence, trial counsel allowed the State to convict Richey and sentence him to death for a crime in which it had failed to satisfy one of the elements. Although the State may have been able to apply the doctrine of transferred intent for other crimes, such as felony manslaughter or perhaps even aggravated murder, the State chose to charge Richey with aggravated felony murder. At the time of the fire, the State could not convict someone of aggravated felony murder without proving that the defendant specifically intended to kill the person who was actually killed. Had Richey's attorneys presented a proper challenge of the application of transferred intent to subsection D of the statute, Richey could not have been constitutionally

convicted of aggravated felony murder, because the State did not prove Richey's specific intent to kill the victim. *Fiore v. White*, 531 U.S. 225, 228-29, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001). And by failing to raise this (and trial counsel's ineffectiveness ) on appeal, appellate counsel again deprived Richey of dispositive relief. Richey was clearly prejudiced by his attorney's deficiencies. Thus, the procedural default of Richey's transferred intent/sufficiency claim is excused because of the ineffective assistance of both his trial and appellate counsel.

Because the Ohio Supreme Court considered the general claim regarding transferred intent, the state procedural rule did not constitute an independent, unreviewable state law ground; however, even if it did, the trial and appellate defaults were excused by cause (the result of ineffective assistance of trial and appellate counsel) and prejudice (inherent in the fact that we find the claim to be meritorious). In either case, Richey's claim was preserved for review.

B. Ineffective Assistance of Counsel

In a challenge that implicates his convictions on all charges, Richey also contends that his trial counsel was constitutionally ineffective in the way he handled his forensic expert and his failure to challenge the scientific evidence of arson. The State argues that this claim has been procedurally defaulted and disputes the claim on the merits.

1. Default

The State argues that this claim has been defaulted because Richey neglected to raise it on direct appeal. As the Ohio Supreme Court has explained, however, "any allegations of ineffectiveness based on facts not appearing in the [trial] record should be reviewed through the postconviction remedies." *State v. Coleman*, 85 Ohio St. 3d 129, 1999 Ohio 258, 707 N.E.2d 476, 483 (Ohio 1999). *See*

*also Byrd v. Collins*, 209 F.3d 486, 521 (6th Cir. 2000). As our analysis below will illustrate in detail, Richey's claims regarding his counsel's ineffective handling of the scientific evidence depend almost entirely on evidence outside the trial record: namely, (1) the testimony of DuBois, who explained trial counsel's limited oversight, supervision, and engagement; (2) the testimony of trial counsel, which illustrated the process (or lack thereof) by which he decided to hire DuBois, as well as his oversight (or lack thereof) over the course of DuBois's scientific investigation; and (3) the testimony of Custer and Armstrong, who explained the type and quality of scientific analysis that a reasonably competent expert would have performed at the time of Richey's trial. Thus, Richey was prohibited from raising these claims on direct appeal.

Instead, Richey was required to raise the claims during his postconviction challenge. He did so. During the postconviction proceedings, Richey argued that he was "wrongfully convicted on the basis of false scientific testimony because trial counsel unreasonably relied upon DuBois, failed to conduct an adequate investigation for a competent expert and failed to call an expert to rebut the State's false scientific testimony," and supported these claims with the statements of trial counsel, DuBois, Custer, and Armstrong. The state courts evaluated and decided the claim on the merits. *See Richey*, 1997 Ohio App. LEXIS 5284, 1997 WL at *3. We therefore may do the same.

2. Merits

As previously noted, *Strickland* requires that Richey demonstrate both deficient performance and resulting prejudice.

a. Deficient Performance

In order to show deficient performance, a defendant must show that counsel's representation "fell below an objective

standard of reasonableness." *Strickland*, 466 U.S. at 688. A "court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*

At the outset, the State, and the dissent to this opinion, argue that Richey has no constitutional right to the "effective assistance of an expert." The district court also noted that it was not unreasonable for trial counsel to "decline [to conduct] further expert-shopping once that expert rendered his opinion." Both might be true if trial counsel had done everything he was supposed to have done, and - through no fault of trial counsel - the expert had simply come up short. *See Skaggs v. Parker*, 235 F.3d 261, 268 (6th Cir. 2000) (defense expert's erratic and incoherent testimony during trial was not attributable to the failings of counsel given that the expert had been recommended by two colleagues and that counsel had used the expert before). But Richey argues, and the record reflects, that the failures of Richey's expert were largely caused by the failures of Richey's counsel. *See Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) ("Counsel's failure to adequately prepare his expert and then present him as a trial witness [amounts to] constitutionally deficient performance."). As Richey's counsel observes, "incompetence cannot excuse incompetence."

First, trial counsel hired DuBois, based solely on a promotional flier that he happened to come across. DuBois was unqualified for the job because he worked primarily in another field, lacked training to do the job, and came into the litigation believing that the State's experts were more reliable than he was. Moreover, the minimal training he had received came from the very people whose conclusions he was being

hired to review. The dissent notes that "There is no suggestion in the record that counsel was put on notice that DuBois was either incompetent or unqualified to serve as Richey's expert." However, we have held that the deficiencies of an expert can be imputed to counsel when counsel has *failed* to adequately research and screen an expert witness. *See Glenn v. Tate*, 71 F.3d 1204, 1210 n.5 (6th Cir. 1995) (finding deficient performance because "we are not prepared to assume that Drs. Ramani and Siddal would have been the experts retained by the defense . . . if counsel had done their homework"). Thus, counsel owes more to his client than a passive duty to watch for red flags of incompetence.

Moreover, trial counsel waited two months after he was retained, and a full month after he received the State's scientific results, to contact and meet with DuBois. After their first meeting, he limited DuBois's initial investigation to ten hours--without any basis for doing so. *See Skaggs*, 235 F.3d at 270 (finding deficient handling of expert not excused "simply because counsel believed it would not be worth their time to request additional money from the court"); *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) (finding deficient performance when counsel "wrongly assumed that funds were unavailable and he abandoned what he knew to be an important pursuit"). After DuBois's stunted investigation, counsel waited another two months to meet with DuBois, who did no work in the interim.

Third, counsel failed to thoroughly inform DuBois about a critical problem with the State's scientific evidence--that the carpet had been housed in a garbage dump and on a parking lot located near gasoline pumps. *See Glenn*, 71 F.3d at 1210 ("Defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant."); *see also Affinito v. Hendricks*,

366 F.3d 252, 260 (3d Cir. 2004) ("When the key issue in a criminal case is whether the defendant suffered from a diminished capacity, we can think of nothing more critical than ensuring that the defense' psychiatric expert has as complete and accurate a description of the facts and circumstances surrounding the crime as possible. . . . [Failure to provide the expert with this information] was not a trial tactic, it was gross incompetence."); *Bloom*, 132 F.3d 1267 at 1273 (finding deficient performance when counsel possessed information that defendant had suffered extensive abuse as child, but counsel "failed to provide the information to Dr. Kling or to any other physician who examined [defendant]"). Although DuBois does not remember precisely what trial counsel told him, he did acknowledge that "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial."

Fourth, trial counsel kept himself in the dark about all aspects of his expert's analysis. Counsel had no idea that DuBois, rather than performing his scientific tests or even conducting his own analysis of the test results, was essentially being spoon-fed the results by Gohar (who was the chief of the State Arson lab). Only after the trial did counsel learn that DuBois performed no testing or independent analysis; counsel had never bothered to instruct or simply ask DuBois about the investigation and analysis he had hired him to perform. Moreover, counsel did not ask for a written report from DuBois explaining his conclusions, nor did counsel ask DuBois about the bases for his conclusions, or even if the State's conclusions suffered from any flaws or gaps. Despite DuBois's endorsement of the State's forensic findings--which seriously damaged Richey's case--counsel, in DuBois's words, "was surprisingly nonargumentative with me [and] didn't challenge me on what I thought or why I thought what I did or anything."

Even though trial counsel was not a scientist, this should not relieve him of his responsibility to understand the evidence being used to convict and execute his client. Furthermore, aside from the presentation of testimony from his own expert, he would have to be sufficiently informed to cross-examine the State's experts. *See Dees v. Caspiri*, 904 F.2d 452, 455 (8th Cir. 1990) ("Counsel had a duty to garner the expertise necessary to cross examine [the State's expert]."). This responsibility was heightened here, given that the State called to the stand not only its own experts but also DuBois. *See Glenn*, 71 F.3d at 1210 ("We can only assume that defense counsel, not having done their homework, were not prepared to interrogate [their court-appointed experts]about the basis for the very damaging conclusions they stated."). That counsel was a lawyer, rather than scientist, should not have left him unable to comprehend even the basics of the science at issue. This is particularly so when the chain of custody, which is a legal issue, was critical to the reliability of the scientific evidence.

Fifth, trial counsel prematurely placed DuBois on his witness list and then failed to mitigate this mistake. Because trial counsel dragged his feet in hiring and debriefing DuBois, he had to put DuBois on his witness list before he was aware how DuBois would testify. *See Skaggs*, 235 F.3d at 270 (rejecting time-pressure as excuse for counsel's performance when the time pressure was itself caused by counsel's "waiting until the eleventh hour to prepare for the penalty phase and to line up a psychiatric expert to testify on [defendant's] behalf"). This became a problem, as once counsel decided against using DuBois, the State subpoenaed him to testify on its behalf. Nor, at this point, did counsel attempt to quash the subpoena or otherwise contest the testimony, or even cross-examine DuBois when he testified.

Finally, counsel failed to offer any competing scientific evidence. Of course, it is not always the case that "counsel

must continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Dees*, 904 F.2d at 454. However, the testimony of Custer and Armstrong makes it clear that, even in 1986, a reasonably diligent attorney would have found witnesses to attack the State's conclusions. And "where there is substantial contradiction in a given area of expertise, it may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony." *Knott v. Mabry*, 671 F.2d 1208, 1213 (8th Cir. 1982). Nor was this a case in which counsel would have had to uncover an expert willing to spew junk science, because Armstrong and Custer both agreed that the scientific standards prevailing in 1986 would have seriously undermined the State's results, and both testified that they would have been available to apply such standards. *See Soffar v. Dretke*, 368 F.3d 441, 477 (5th Cir. 2004) ("As was made evident during the state habeas proceedings, . . . defense counsel would not have had to look far to find a ballistics expert who could have provided testimony to aid his defense.").

Instead, counsel adopted a defense that rendered Richey a sitting duck. Given the testimony of witnesses that Richey was upset at his ex-girlfriend and had made threatening comments, trial counsel's theory - that the fire was intentionally started by someone else - was doomed to fail. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (presentation of alibi defense did not excuse counsel's failure to investigate possibility that defendant in rape case was impotent, given that"[defendant's] alibi defense was vulnerable" - "the vulnerability of the alibi defense shows the unreasonableness of the attorney's failure to investigate further and present the impotency defense"). And even if counsel had reasonably believed that this defense had merit, he could not have made an informed choice without reasonably investigating the alternatives. *See Soffar*, 368

F.3d at 474 ("An actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results.").

Trial counsel's failure to screen, supervise, or engage DuBois left Richey with little more than "a warm body with a prefix attached to his name," *Skaggs*, 235 F.3d at 273 n.3 (quoting *Ramdass v. Angelone*, 187 F.3d 396, 411 n.1 (4th Cir. 1999) (Murnaghan, J., dissenting)). In a case anchored by scientific evidence, the failure to subject this evidence to meaningful adversarial testing was woefully deficient. Moreover, we are unable to articulate any sound professional reason why counsel did not do so. The dissent argues that counsel was obligated to provide DuBois's name as a potential witness, and that the prosecution's use of the defense's expert does not violate the defendant's rights. While we agree that Richey's rights were not violated simply because the State used DuBois as its own witness, we believe that given the context here - where the defendant had a single expert witness who conducted no independent analysis and then became the witness for the other side without any cross-examination - there was a massive failure by trial counsel in his handling of the expert witness. Accordingly, we must conclude that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The state court's conclusion to the contrary was unreasonable.

b. Prejudice

We proceed to measure prejudice. In order to show prejudice, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt about his guilt." *Combs*, 205 F.3d at 290. "A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome." *Foster*, 9 F.3d at 726. In determining whether

there was prejudice, we "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The prejudice inquiry is complicated slightly in this case because trial counsel's errors were twofold: deficiencies plagued both his hiring and handling of DuBois. Under either scenario, however, the evidence of prejudice is overwhelming.

Had counsel made the effort to find a qualified expert, rather than blindly hiring DuBois, the expert would have had the expertise and wherewithal to undermine the State's evidence that the fire was caused by arson. Custer and Armstrong highlighted a litany of irregularities in the State's scientific evidence. First, Custer revealed alternative explanations for the circumstances that led Cryer to finger arson as the culprit, and surmised that the fire was more consistent with an accidental outbreak. Second, Armstrong opined that "there is no evidence of an identifiable ignitable liquid in any of the samples from the fire scenes." Moreover, the blunders that Armstrong highlighted - the State's failure to use accepted methodology, use control groups, and eliminate other explanations, to name a few - would likely have led the factfinder to adopt the defense's understanding of the science.

Custer and Armstrong similarly explained, without refutation, that the scientific standards upon which they relied were widely accepted in 1986, leaving little doubt that counsel would have been able to find a competent expert had he bothered to look for one. *See Horsley v. Alabama*, 45 F.3d 1486, 1495 (11th Cir. 1995) ("To prove prejudice by failure to investigate and failure to produce a certain kind of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced."). Indeed, both Custer and

Armstrong averred that they would have served as experts at the time, had they been contacted by counsel.

These experts' attacks on the State's evidence would have been all the more powerful given the absence of corroborating physical evidence. Neither Richey's clothing, boots, or bandage revealed the presence of accelerants. No empty cannisters of flammable liquids were found at or around the scene. And the owner of the neighboring greenhouse--from which the State theorized Richey stole the accelerants--was unable to determine whether anything was missing.

Furthermore, even if counsel's initial decision in hiring DuBois was proper, counsel's ineffective handling of DuBois resulted in prejudice to Richey. First, counsel's delays in hiring DuBois, and his arbitrarily limiting the hours that DuBois could work without understanding what type of work needed to be done in this case, made DuBois more dependent on the legwork of the State's experts, whose conclusions he was already predisposed to accept. Moreover, counsel's procrastination forced him to disclose DuBois as a potential witness before he knew whether doing so would benefit his client. The result was that the State was able to present not only the testimony of its own scientists, but also use Richey's own expert against him. *Cf. Bloom*, 132 F.3d at 1278 (finding prejudice when "[expert]'s report, which he now acknowledges was inaccurate, permitted the prosecution to turn Kling's trial testimony against [defendant]").

Second, trial counsel's failure to supervise DuBois left him unaware that DuBois was being spoon-fed results from the State, rather than conducting an independent analysis of the data. Counsel's failure to engage DuBois meant that possible deficiencies in the State's evidence were never explored, and also left him wholly unprepared to challenge the State's evidence or to cross examine his own expert as

later became necessary. *See Skaggs*, 235 F.3d at 274 (prejudice when "defense counsel failed to prepare or present any other meaningful mitigation evidence that might have compensated for their use of [an unqualified expert]").

Finally, trial counsel's failure to fully inform DuBois about the carpet samples' excursions at the garbage dump and parking lot deprived DuBois of all the information he needed to draw his conclusions, and made him more likely to agree with the conclusions of the State. Indeed, DuBois has subsequently indicated that his conclusions would likely have changed had he been fully informed about the chain of custody problems. *Bloom*, 132 F.3d at 1276 (finding prejudice from failure to disclose information to expert given that "had he been provided with this information at the time of his original evaluation, he would have altered his conclusions").

The record indicates that a competent arson expert--fully informed and supervised, and using the methods available to him at the time of trial--would have all but demolished the State's scientific evidence, and with it a large part of the case against Richey. *See Foster*, 9 F.3d at 722 (finding prejudice because "if the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story"). The State presented other evidence, of course, which demonstrated Richey's motive, means, and opportunity. But the prejudice inquiry is not the same as the sufficiency of the evidence analysis or the analysis that a court might perform when deciding a motion for summary judgment. As the Fifth Circuit has explained, we need *not* find "that a reasonable jury could not have reached the same verdict if counsel had performed effectively." *Johnson v. Scott*, 68 F.3d 106, 109 n.4 (5th Cir. 1995). Richey "need not show that he could not have been convicted. Instead, he need only undermine our confidence in the trial's outcome." *Foster*, 9 F.3d at 726.

Witnesses, moreover, are not always believed. Just as an alleged victim's testimony that the defendant had raped her became far less persuasive given evidence that the defendant was impotent and thus physically incapable of raping her, *see id.*, the testimony of Richey's acquaintances and Hope Collins, who had a motive to downplay her own responsibility for her daughter's death, would have been far more vulnerable to impeachment and skepticism absent evidence that the fire stemmed from arson. *See also Combs*, 205 F.3d at 290 (finding prejudice from defense counsel's mishandling of scientific evidence of defendant's mental capacity for acting with "purpose and intent," even though "the State presented other evidence of [defendant]'s purpose and prior calculation and design"); *Baylor v. Estelle*, 94 F.3d 1321, 1324-25 (9th Cir. 1996) (finding prejudice from defense counsel's failure to pursue evidence that semen found at scene of the first of a series of rapes did not come from defendant, even though defendant had made detailed confession to the rapes); *cf. United States v. Tarricone*, 996 F.2d 1414, 1419 (2d Cir. 1993) (finding prejudice from defense counsel's failure to pursue exculpatory handwriting evidence, even though there was other circumstantial evidence of defendant's guilt).

Accordingly, we find that counsel's incompetent handling of the sole forensic expert in this case fell far below the wide range of acceptable professional standards, and that absent counsel's grave mistakes, there is a reasonable probability that the three-judge panel would have at least had a reasonable doubt as to whether Richey set the fire that ultimately caused the death of Cynthia Collins.

## III. CONCLUSION

Because our holdings above entitle Richey to all the relief that he has sought, we do not consider or decide his other claims. The district court's judgment is REVERSED, and the

case is REMANDED with instructions that a conditional writ of habeas corpus, giving the State of Ohio ninety days to attempt to retry Richey or release him from custody, be GRANTED.

SILER, Circuit Judge, dissenting. I respectfully dissent from the majority's conclusions that there was insufficient evidence against Richey on the charge of aggravated felony murder, that this issue was not procedurally defaulted, and that trial counsel was ineffective in his handling of his expert witness, DuBois.

The first issue, insufficiency of the evidence, due to the fact that Richey could not have been sentenced to death for the aggravated felony murder charge under Ohio Revised Code § 2903.01 through transferred intent, is procedurally defaulted. As the majority opinion states, Richey has conceded that he did not raise this claim at trial or on direct appeal. The district court correctly found that this issue was procedurally defaulted. As it said: "Richey did raise an insufficiency of evidence claim to the Ohio Supreme Court, although that claim asserted only that his conviction rested on solely circumstantial evidence." The Ohio Supreme Court discussed transferred intent only as a sub-issue under the issue of circumstantial evidence. *See State v. Richey,* 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915, 925 (Ohio 1992). Transferred intent is not one of the issues listed in the certificate of appealability. To the contrary, the district court denied a certificate of appealability on this issue, and we did the same. Therefore, the question of transferred intent can only be approached by this court as a subpart of the certified issue on appeal of the ineffective assistance of appellate counsel either by the failure of appellate counsel to raise the question on direct appeal, or the failure of appellate counsel to raise the question of ineffective assistance of trial counsel

for his failure to argue the issue of transferred intent before the trial court.

As the district court correctly found, this assertion is in the nature of a faulty indictment claim, which must be raised prior to trial under Ohio Rule of Criminal Procedure 12. Of course, Richey gets around that barrier by asserting that the Ohio Supreme Court reached the issue of transferred intent, but it was part of its ruling on the sufficiency of the evidence, not as a separate issue. Nevertheless, the majority has accepted Richey's argument of skirting the procedural default by finding that trial counsel was ineffective for failing to challenge the sufficiency of the evidence under this transferred intent issue, and that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel on that point. However, that issue was also procedurally defaulted, because of the failure by Richey to timely reopen his appeal in the Ohio courts under Ohio Rule of Appellate Procedure 26(B), as the Ohio Supreme Court held that the motion was untimely. Nevertheless, assuming that it was not barred by an untimely application under Rule 26(B), as the district court found, I would still find that there was no ineffective assistance of appellate counsel for failing to raise the ineffective assistance of trial counsel on this point of transferred intent. The reason for my conclusion is simple. The Ohio Supreme Court found that the doctrine of transferred intent applied in this case when it said "' the doctrine of transferred intent is firmly rooted in Ohio law.'" *Richey*, 595 N.E.2d at 925 (quoting *State v. Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294, 1305 (1988)). It held that the doctrine of transferred intent was applicable under Ohio Revised Code § 2903.01(B). Therefore, had counsel raised the issue before the trial court and preserved it on appeal, the issue would have been lost before the Ohio Supreme Court.

The majority admits that the Ohio Supreme Court ruled that transferred intent is applicable under the charge in this

case. However, it has essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes. It relies upon the language from *State v. Mullins*, 76 Ohio App. 3d 633, 602 N.E.2d 769, 771 (Ohio Ct. App. 1992). However, the language quoted from *Mullins* is *dictum*, for the holding was that the doctrine of transferred intent applied in a case where the defendant was charged under Ohio Revised Code § 2903.02(A). Obviously, the Ohio Supreme Court did not feel bound by it, not only because it was *dictum* but it came from a lower court. Instead, the Ohio Supreme Court interpreted the *Sowell* case and found that transferred intent had always applied in similar cases.

The majority correctly states that the scope of review under AEDPA requires that we uphold the decision of the Ohio Supreme Court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). I am not certain on which of these prongs the majority has anchored its decision, but it seems to be that it was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court. It cites *Fiore v. White*, 531 U.S. 225, 228-29, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001), which held that a state criminal conviction violates the Due Process clause of the Fourteenth Amendment when a person is convicted of a crime when the elements of the crime have not been proven beyond a reasonable doubt. In *Fiori*, the crime for which the defendant was convicted was the failure to possess a permit for the operation of a hazardous waste facility. The Commonwealth agreed that it had not proven that basic element. To the contrary, in this case at bar, the State met its burden to prove intent through the doctrine of

transferred intent, which was the law in Ohio at the time of this crime, as interpreted by the Ohio Supreme Court.

The majority also relies upon *Bouie v. City of Columbia*, 378 U.S. 347, 351, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), for the proposition that the Ohio Supreme Court could not retroactively expand the criminal act prohibited under Ohio law. However, the Ohio Supreme Court held that its decision in this case followed the law which had been in Ohio for many years preceding Richey's conviction. Therefore, the Ohio Supreme Court's ruling on transferred intent was neither contrary to nor involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. From *Williams v. Taylor*, 529 U.S. 362, 411, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), under the "unreasonable application" clause,

> a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

I suggest that the Ohio Supreme Court did not make any unreasonable application of clearly established Federal law here, nor was it contrary to *Fiori* or *Bouie*. It is best to leave it up to the Ohio Supreme Court to decide the application of its own laws, so long as it does not do so unconstitutionally. *Cf. Mitchell v. Esparza*, 540 U.S. 12, 17, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."). Thus, appellate counsel was not ineffective for not raising ineffective assistance of trial counsel on this issue.

I also respectfully disagree with the majority on its conclusion that Richey was deprived of the effective assistance of counsel at the guilt phase of his trial. The Ohio Court of Appeals found that counsel was not ineffective under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *State v. Richey,* 1997 Ohio App. LEXIS 5284, 1997 WL 722782, at *3 (Ohio Ct. App. 1997). Therefore, because it correctly identified *Strickland* as the authoritative case governing Richey's claim, we must decide whether its application of the *Strickland* standard was "objectively unreasonable." *Williams*, 529 U.S. at 409. It is Richey's "burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (*per curiam*).

I agree with the majority that this issue is not procedurally defaulted, due to the fact that the Ohio Court of Appeals ruled on it and the circumstances of this claim depend on evidence outside the trial record. However, I disagree with the majority on the issue of deficient performance, so I do not discuss the question of prejudice as an alternative basis except for one minor point. The majority finds several errors amounting to ineffective assistance on the selection and use of the expert witness, DuBois. The majority concludes that DuBois was unqualified for several reasons. However, in *Skaggs v. Parker*, 235 F.3d 261, 272 (6th Cir. 2000), we noted that a claim "that the petitioner is entitled to a competent expert in his defense," has never been "explicitly adopted by this Court." *Accord Campbell v. Coyle*, 260 F.3d 531, 550-51 (6th Cir. 2001). The record does not support Richey's allegation that counsel retained DuBois without performing an adequate background check. Richey makes much of DuBois's academic inexperience in the fields of forensic science and fire investigation, but it appears that his in-class training consisted of courses in fire investigation

taught by members of the Ohio Fire Marshal's Office, the very entity he was hired to critique. There is no suggestion in the record that counsel was put on notice that DuBois was either incompetent or unqualified to serve as Richey's expert. The majority infers that it was wrong to find him through a promotional flier, but that does not disqualify an expert. After counsel contacted DuBois and discussed some of the facts of the case, DuBois sent a follow-up letter explaining the services he and his employer would provide. The letter included the fact that his business would "investigate the cause and origin of a fatal apartment fire." It would "include a visit to the fire scene, review of available information and reports, and a preliminary report of our findings." He also estimated that he could do it in ten hours. DuBois listed his company's services, which included fire and explosions investigations. Nothing in his resume or company profile indicated that he was either incompetent or unqualified to serve as an expert. Moreover, DuBois indicated that his company was involved in approximately 400-500 fire investigations prior to 1987 and he played some role in almost all of them. In 1986 alone, DuBois was involved in 10-30 arson investigations. Based on the foregoing, it cannot be said that the decision to hire DuBois was "objectively unreasonable" pursuant to *Strickland*. Although his classroom training in forensic science and fire investigation was fairly limited, counsel could not have been on notice of such limitations, and any academic inadequacies seemed to have been compensated for with practical field experience. Obviously, there may have been experts out there somewhere who were better qualified, but the law does not require counsel to search throughout the world to find the best expert in the field and hire him. *See Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995).

The majority also finds fault in counsel's delay in meeting with DuBois and limiting the initial investigation to

ten hours. However, these sub-claims were never raised in State court, so they were procedurally defaulted. Even if these sub-issues were not procedurally defaulted, the claims cannot prevail on the merits. Although counsel's delay in providing DuBois with the State's scientific report and data prevented DuBois from conducting an independent test of the extracts, Richey has not argued that counsel knew of or should have known of the short lifespan of the extracted compounds. This is not a situation where an attorney was aware of a particular risk and ignored it; rather, this is a situation where only with the benefit of hindsight that counsel's delay could have been harmful. The Supreme Court has warned that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, Dr. Armstrong testified that his review of the data suggests that there were no extracts available to be tested following the State's initial test. That is, the State's original tests used up all the extracts. Thus, regardless of how soon counsel could have insisted that DuBois conduct his own tests, no tests could have been performed. Richey has not alleged that the State violated any laws in the course of conducting the tests. Furthermore, the fact that extracts were not available in this case did not prevent Dr. Armstrong from later rendering an opinion as to the accuracy and validity of the State's tests.

The limitation of ten hours for the work of the expert shows nothing. Richey has not shown prejudice under *Strickland*. DuBois testified that he spent more than ten hours on the case and his biggest limitation was not being able to see the fire scene carpeting, which was not the result of counsel's alleged ineffectiveness.

The majority also criticizes counsel's failure to inform DuBois about the fact that the carpet was removed from a

dumpster on a parking lot located near gasoline pumps. But DuBois was ambiguous about this. In his deposition, he said he probably knew it. He also said:

> I do recall [counsel] told me that the carpeting had been thrown out and - I probably misstated whether or not he told me it had been sampled and then thrown in the dumpster or thrown in the dumpster then sampled. But I did know that there was some questionable handling of the carpeting after the fire, and [counsel] was rather upset about it.

Counsel also raised this at trial. Therefore, it is unclear whether counsel withheld this information from DuBois. Thus, Richey has not carried the burden to show this conduct to be objectively unreasonable behavior.

Next, the majority criticizes the fact that trial counsel placed DuBois on his witness list and then failed to mitigate the mistake. Although counsel did not have DuBois's report, he was obligated to disclose the name of this witness under the Ohio Criminal Rules. He had a tactical reason for disclosing the name of the expert, so he was not ineffective by making such a disclosure. Morever, counsel was not ineffective for failure to quash the subpoena or otherwise contest his testimony. The Ohio Supreme Court discussed the underlying merits of that issue. *See Richey,* 595 N.E.2d at 922-23. It indicated that the prosecution's use of a defense expert does not violate the rights of an accused, unless there is a disclosure of confidential communications between the attorney and the client. In this case, there were no such problems. Therefore, any objection or attempt to quash the subpoena would have been unsuccessful. If counsel was thinking of the possibility of calling DuBois as a witness, he had to list his name, even when he did not yet have DuBois's

report. Otherwise, had DuBois filed a report favorable to Richey, counsel may not have been able to use DuBois.

Finally, the majority criticizes counsel for failing to offer any competing scientific evidence or to screen, supervise, or engage DuBois. However, counsel does not have a duty to "continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Dees v. Caspiri*, 904 F.2d 452, 454 (8th Cir. 1990) (per curiam). Unless a defense attorney has reason to doubt the objectivity of an expert, the failure to obtain a new "impartial" expert will not be objectively unreasonable. *See Jones v. Murray*, 947 F.2d 1106, 1112 (4th Cir. 1991). DuBois reviewed the results of the tests from the State's expert and agreed with them. There was nothing to indicate to counsel that the results were not correct. The Supreme Court has indicated that post-AEDPA claims of ineffective assistance of counsel will succeed only in limited circumstances. In *Bell v. Cone*, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002), the Court stated:

> For [petitioner] to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the ... Court ... applied *Strickland* to the facts of his case in an objectively unreasonable manner.

*Id.* at 698-99 (internal citations omitted). Richey has not done that here. Therefore, I would not find that the decisions of the Ohio courts were contrary to or unreasonable applications of Federal law as interpreted by the Supreme

Court. Thus, I would affirm the decision of the district court in denying the petition for a writ of habeas corpus.

**APPENDIX B**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3477

KENNETH T. RICHEY,
Petitioner-Appellant,
v.
BETTY MITCHELL,
Warden, Respondent-Appellee

April 15, 2005, Filed

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

BEFORE: SILER, DAUGHTREY, and COLE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active * judges

of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Judge Cook recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Siler would grant rehearing for the reasons stated in his dissent. The panel has added the sentence "The state court's conclusion to contrary is unreasonable" to the paragraph before Part III. Conclusion on page 22 of the opinion.

**APPENDIX C**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Kenneth T. Richey, | ) | CASE NO. 1:98 CV 1418 |
| | ) | |
| Petitioner, | ) | JUDGE PATRICIA A. |
| | ) | GAUGHAN |
| vs. | ) | |
| | ) | Memorandum of Opinion |
| Betty Mitchell, Warden, | ) | and Order |
| | ) | |
| Respondent. | ) | |

This matter is before the Court upon petitioner Kenneth Richey's Petition for Writ of Habeas Corpus (Doc. I). For the following reasons, the Petition is DENIED.

Introduction

Petitioner, Kenneth Richey, acting pursuant to 28 U.S.C. § 2254, filed a Petition for Writ of Habeas Corpus challenging his conviction and sentence of death rendered by an Ohio court. The respondent, Betty Mitchell, Warden, filed a timely Return of Writ and petitioner filed a Traverse. For the following reasons, the Petition for Writ of Habeas Corpus is denied.

I. Factual History

On July 10, 1986, a Putnam County Court of Common Pleas Grand Jury issued a five-count indictment against petitioner: aggravated murder in violation of Ohio

Revised Code § 2929.02 with a felony-murder death penalty specification in violation of Ohio Revised Code § 2929.04(A)(7); aggravated arson in violation of Ohio Revised Code § 29290.2(A)(1); breaking and entering in violation of Ohio Revised Code § 2911.13(A); involuntary manslaughter in violation of Ohio Revised Code § 2903.04(A); and child endangering in violation of Ohio Revised Code § 2919.22(A). (Respondent Ex. 1).

Petitioner originally entered pleas of not guilty by reason of insanity on July 14, 1986. (Respondent Ex. 2). The court ordered a psychiatric evaluation to evaluate petitioner for sanity at the time the crimes were committed arid competency to stand that. (Respondent Ex. 3). After several pre-trial motions, petitioner waived the right to a jury trial and chose to be tried by a three-judge panel. (Respondent Ex. 17). He also withdrew his plea of not guilty by reason of insanity.

The Ohio Supreme Court set out the following factual history, as adduced by the evidence presented at trial, upon considering petitioner's direct appeal of his convictions and sentence:

> Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's [sic] second-floor apartment, killing Cynthia Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.
>
> Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events lived at the Old Farm Village Apartments in

Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15 and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 am., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying. "If can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives"

in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said, "Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying. "A Building was going to burn * * 'I*'' Juanita Altimus, while just outside of her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 am., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 am., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] – she's asleep – but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 am., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from K & J Greenhouse for Candy, and police found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview.

In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment;

> he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.
>
> * * * A panel of three judges convicted Richey of all charges, save the manslaughter charge, which was dropped. Following a presentence investigation, mental evaluation, and mitigation hearing, the panel sentenced Richey to death for aggravated murder and consecutive prison terms for the other offenses.

*State v. Richey*, 595 N.E.2d 915, 918-920 (Ohio 1992).

II. Procedural History

Petitioner, represented by new counsel, Ken Murray and Jane P. Perry, from the Ohio Public Defender's Commission, filed a timely direct appeal of the trial court judgment to the Third District Court of Appeals setting forth twenty-two assignments of error.[1] (Respondent Ex. 47).

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[1] The assignments of error are as follows:

> 1. Ohio's multiple counts statute, Ohio Revised Code § 2941.25, was violated when appellant was sentenced for both aggravated murder and aggravated arson, thereby denying appellant his statutory and constitutional double jeopardy and due process protections.
>
> 2. Ohio's multiple count statute, Ohio Revised Code § 2941,25, was violated when appellant was sentenced for both aggravated murder and child endangering, thereby denying appellant his statutory and

constitutional double jeopardy and due process protections.

3. A death sentence based upon a sole aggravating circumstance which merely duplicates an element of the underlying crime is violative of Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

4. The State's circumstantial evidence was insufficient, as a matter of law, to prove every essential element of the capital crime with which he was charged. Because appellant's capital conviction was based on insufficient evidence, he was deprived of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution, and his conviction must be vacated.

5. Appellant's conviction of the capital offense was against the weight of the evidence. In the interest of justice, that conviction must be vacated.

6. The trial court erred when it permitted the assistant state fire marshal to testify as to two exhibits which the state failed to prove the chain of custody. The court further erred when it permitted those exhibits to be admitted into evidence, in violation of Appellant Richey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

7. The sentence of death imposed on Appellant

Richey was unreliable and inappropriate. The death sentence in Appellant's case violated the Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

8. The death sentence in Appellant Richey's case was excessive and disproportionate, thereby resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

9. The trial court's failure to consider Appellant's mitigating evidence in its sentencing determination was contrary to Ohio Revised Code § 2929.04(B)(7), the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

10. It was error to include in Appellant's pre-sentence report material suppressed at trial as irrelevant to aggravation or mitigation, victim impact statements and unverified or inaccurate information. The report also introduced for the sentencer's consideration the non-statutory aggravating circumstance of appellant's future dangerousness. This deprived appellant of his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and undermined the reliability in capital sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article 1, of the Ohio Constitution.

11. The trial court erred in failing to state its essential

factual findings on the record when it overruled appellant's motion to suppress as required by Criminal Rule 12(E), violating his rights as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution.

12. The trial court erred in denying Appellant's motion to suppress statements. The statements were not obtained in accordance with the rule espoused in *Miranda v. Arizona*, and violated Appellant's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

13. The trial court's failure to sever count three of the indictment against Appellant Richey prejudiced his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution, constituted abuse of the trial court's discretion, and requires reversal of Appellant's convictions.

14. The unmistakable pattern of substantial misconduct during the closing argument of the guilt phase of Appellant's trial induced the panel to convict and sentence to death according to factors which were irrelevant and highly prejudicial. The misconduct violated Appellant's rights to due process, equal protection, fair trial and against cruel and unusual punishment.

15. The improper introduction of other acts as evidence in the guilt phase of Appellant's capital trial

violated Evidence Rule 404(b) and Ohio Revised Code § 2945.59. The misuse of this evidence deprived Appellant of the reliability and fairness in a capital trial required by the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution.

16. The trial court abused its discretion by denying defense counsel's motion to admonish and sequester witnesses. This denial deprived Appellant of his right to a fair trial and the right to be free from the infliction of cruel and unusual punishment as required by the Fourteenth and Eighth Amendments respectively.

17. The State's failure to record the grand jury proceedings in Appellant Richey's case violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections 9, 10, and 16, Article I, of the Ohio Constitution.

18. The trial court erred in failing to keep a complete record of all proceedings throughout the guilt and mitigation phases of Appellant's trial by allowing unrecorded sidebars, and by failing to have the view of the crime scene recorded. These failures violated Appellant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution, Section 16, Article I, of the Ohio Constitution, and Section § 2929.05 of the Ohio Revised Code.

19. Appellant was denied the effective assistance of counsel in his capital trial as guaranteed by the Sixth and Fourteenth Amendments to the United States

The appellate court affirmed the trial court's judgment, overruling petitioner's assignments of error. *State v. Richey*, No. 12-87-2, 1989 WL 156562 (Ohio Ct. App. Dec. 28. 1989). In a separate opinion, the Third District Court of Appeals re-weighed and affirmed the sentencing decision of the trial court. *State v. Richey*, No. 12-87-2, 1989 WL

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Constitution and Section 10, Article I of the Ohio Constitution.

20. Ohio's mandatory sentencing scheme prevented the three judge panel from deciding whether death was the appropriate punishment in violation of Appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

21. The trial court erred in imposing the death sentence of Appellant Richey. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution, establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in 2903.01, 2929.02., 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05 do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to Kenneth Richey.

22. Appellant's right to the effective assistance of counsel was violated when the State called as a witness, during its case-in-chief, a defense-retained expert.

156561 (Ohio Ct. App. Dec. 28, 1989). Petitioner, represented by Jane P. Perry and Kevin L. Fahey of the Ohio Public Defender Commission, directly appealed to the Ohio Supreme Court, raising twenty-three propositions of law.[2] (Respondent Ex. 53). The Ohio Supreme Court

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[2] These propositions of law are as follows:

> 1. The introduction of testimony that the capital defendant has threatened the prosecutor and witnesses in his case, which testimony is irrelevant to any issue of consequence in the case and irrelevant to any of the proper purposes under Ohio Revised Code § 2945.59 and Evidence Rule 404(B), destroys the reliability and fairness in a capital trial required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I of the Ohio Constitution.
>
> 2. When the judges who are triers of facts in a capital case are persuaded to act on information that the defendant is a dangerous person and a subverter of the criminal justice system, the defendant is denied his rights to a fair trial and fair and impartial judges under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
>
> 3. When the presentence report in a capital [sic] contains material that (1) has been suppressed at trial as irrelevant to aggravation or mitigation (2) is a non-statutory aggravating circumstance and (3) exposes the judges to information which jeopardizes the appearance of fairness and fairness itself, the capital defendant is denied his rights to due process, a fair trial and a fair and reliable sentencing determination as guaranteed by the Fifth and Fourteenth

Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution and undermined the reliability in capital sentencing required by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution.

4. Absent compelling justification or waiver, it is improper for the prosecution to use testimony from a defense expert in the state's case-in-chief. Such a practice denies the defendant his rights to a fair trial and the effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. The Sixth, Eighth and Fourteenth Amendments to the United States Constitution guarantee the accused's rights to a fair trial and to not be subject to prosecutorial misconduct. Appellant Richey was denied those rights as a result of prosecutorial misconduct in the guilt phase of his capital trial.

6. When the state fails to show with reasonable certainty that physical evidence offered at trial is in substantially the same condition as it was at the time of the crime. The admission of such evidence violates the capital defendant's right to due process, a fair trial and a reliable guilty verdict under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 9, 16, Article I, of the Ohio Constitution.

7. Convictions based on circumstantial evidence which is not sufficient to prove every element of the

charged crimes beyond a reasonable doubt violate the capital defendant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

8. The Sixth, Eighth and Fourteenth Amendments guarantee the accused's rights to a fair trial and a reliable determination of guilt in a capital case. The trial court's failure to take steps to minimize the risk of collusion among state's witnesses denied Appellant Richey those rights.

9. Statements obtained in violation of *Miranda v. Arizona*, and the underlying privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution are not admissible in the State's case-in-chief. Further, statements taken without *Miranda* warnings and notice to counsel after counsel has been appointed violated the right of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution are equally inadmissible in the State's case-in-chief.

10. The failure to sever for trial a count which is not proved to be related to the capital charge for which the defendant is on trial and is used merely to bolster a weaker case on the capital charge denies the capital defendant his right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 and 16, Article I, of the Ohio Constitution.

11. Sentences for both aggravated murder and aggravated arson violate Ohio Revised Code § 2941.25, the Fifth and Fourteenth Amendments to the United States Constitution and Section 10 and 16, Article I, of the Ohio Constitution.

12. Sentences for both the aggravated murder and child endangering violate Ohio Revised Code § 2941.25, the Fifth and Fourteenth Amendments to the Untied States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

13. The state's failure to record the grand jury proceedings in Appellant Richey's case violated his rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

14. Criminal Rule 12(E) requires the trial court to state its essential findings on the record when factual issues are involved in determining a motion. Failure to do so deprives the capital defendant of his rights to due process and adequate and meaningful review of his capital conviction as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

15. Appellant Richey was denied the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

16. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution require a complete record, the effective assistance of appellate counsel and meaningful appellate review in a capital case. The failure to record the panel's view of the scene in Appellant Richey's case violated these rights.

17. The sentencer's failure to give any weight and effect to relevant mitigating evidence in a capital case is contrary to the Eighth and Fourteenth Amendments of the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

18. The sentence of death imposed on Appellant Richey was unreliable and inappropriate. The death sentence in Appellant's case violated the Eighth and Fourteenth Amendments to the United States Constitution, Article 1. Sections 9 and 16 of the Ohio Constitution and Ohio Revised Code § 2929.05.

19. When the reviewing court relies on matters outside the record and fails to give individualized consideration to the capital defendant's particular character and family background, the determination of the appropriateness of death sentence does not comport with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution and Ohio Revised Code § 2929.05(A).

20. The "proportionality review" required by Ohio Revised Code § 2929.05 must meet the requirements of due process as required by the Fifth and Fourteenth Amendments to the United States Constitution. The present method of proportionality review conducted

affirmed petitioner's conviction.[3] *State v. Richey*, 595

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by this court does not meet those requirements.

21. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 10 and 16, Article I, of the Ohio Constitution and Ohio Revised Code § 2929.05 guarantee a convicted capital defendant a fair and impartial review of his death sentence. The statutorily mandated proportionality process in Ohio is fatally flawed thereby denying Appellant Richey the above rights.

22. A death sentence based on commission of a felony murder when the aggravating circumstance merely duplicates an element of felony murder, violated the Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 9, and 16, Article I of the Ohio Constitution.

23. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in Ohio Revised Code § 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, 2929.05, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied to Appellant Richey.

[3] Justices Sweeney, Wright and Brown dissented. In writing for the dissent, Justice Brown noted a mitigating factor that the majority overlooked and instances of trial error during the proceeding.

N.E.2d 915 (Ohio 1992). The Ohio Supreme Court thereafter denied petitioner's Motion for Rehearing. (Respondent Ex. 60). The United States Supreme Court subsequently denied petitioner's petition for certiorari. *Richey v. Ohio*, 507 U.S. 989 (1993).

Petitioner, represented by Paul E. Nemser and Scott E. North, then filed an application to reopen his direct appeal pursuant to Ohio Rule of Appellate Procedure 26. (Respondent Ex. 61). The Third District Court of Appeals denied the application, however, because petitioner failed to demonstrate the "good cause" necessary to excuse an

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Regarding mitigation, Justice Brown noted that Richey made several attempts to rescue Cynthia Collins from the fire. He entered the burning building to rescue her and told firemen and anyone else nearby "there's a baby in there." *State v. Richey*, 595 N.E.2d 915, 931 (Ohio 1992). Justice Brown chastised the majority for asserting that Richey attempted to interfere with rescue efforts, believing instead that "[w]hile there is some evidence that his presence (because he was overwrought) was not helpful, this is in no sense contradictory to the fact that defendant's desire was to save the child." *Id.* Moreover, Justice Brown cites Richey's lack of animus toward Cynthia Collins as a mitigating factor. He noted that Richey repeatedly inquired as to Cynthia's whereabouts as firefighters were extinguishing the fire. Justice Brown determined: "I can find no case in Ohio where a defendant in a felony murder case has been put to death unless he had specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both." *Id.* at 933.

Based on the above mitigating factors and some errors Justice Brown believed occurred during both the guilt and mitigation phases, Justice Brown concluded that the death penalty should be overturned in Richey's case.

untimely application.[4] Petitioner then appealed to the Ohio Supreme Court, raising twenty-five propositions of law.[5]

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[4] Ohio Rule of Appellate Procedure 26(B)(l) requires "[a]n application for reopening [to] be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

[5] The propositions of law are as follows:

> 1. The application of the transferred intent doctrine in Richey's case violated his Constitutional rights.
>
> 2. The fundamental difference between Richey's indictment and the case that was tried against him constituted a constructive amendment of his indictment in violation of his right to indictment by a grand jury as guaranteed by Section 10, Article I, of the Ohio Constitution.
>
> 3. There was insufficient evidence to support the three-judge panel's express finding that Richey formed the specific intent to cause the death of Cynthia Collins.
>
> 4. The fundamental difference between the transferred intent theory the State announced in its Bill of Particulars and the three-judge panel's unsupported finding of a specific intent to kill Cynthia Collins deprived Richey of his federal and state constitutional rights.
>
> 5. There was insufficient evidence from which the three-judge panel could have found that Richey formed the specific intent to cause the death of Candy

Barchet and/or Mike Nichols.

6. To the extent the three-judge panel found Richey guilty as charged in the Bill of Particulars of specific intent to kill Barchet and/or Mike Nichols, the verdict was ambiguous and in violation or Richey's right to a unanimous verdict.

7. The statutory definition of "reasonable doubt" in Ohio Revised Code § 2901.05(D) reflects a clear and convincing evidence standard of proof – a standard markedly below that required by the federal and state constitutions.

8. The trial court erred when it informed Richey on December 12, 1986, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

9. At Richey's trial, substantial, irrelevant, immaterial and incompetent information, which was prejudicial to Richey, was introduced into evidence in violation of Richey's rights under federal and state constitution.

10. The trial court's rejection of Richey's mitigation arguments based on what it termed the unrefuted evidence that the defendant pulled the fire alarm [i.e., the smoke detector] from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise was arbitrary and capricious because there was no evidence that Richey disconnected the smoke detector.

11. The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the state and federal constitutions and Ohio law.

12. By requiring that the mitigation factors introduced by Richey "justify", rather than simply "mitigate", the trial court deprived Richey of his rights as under the state and federal constitutions and Ohio law.

13. The Ohio death penalty scheme is unconstitutional because it imposes an increased risk of death on capital defendants who exercise their right to trial over those who plead guilty.

14. Richey was substantially prejudiced by the submission of a presentence investigation report ("PSI") to the three-judge panel.

15. On direct appeal, Richey's prior appellate counsel did not raise a number of deficiencies in Richey's trial counsel's performance.

16. Even if each of the individual deficiencies of Richey's trial counsel's performance (*see* Proposition of Law No. XV, supra, and original Brief of Appellant, Assignment of Error No. XIX) in and of itself did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

17. Richey received ineffective assistance of appellate counsel because prior counsel did not show this Court that the highly prejudicial and inflammatory fragment

of a letter written by Richey, which was improperly admitted at trial was utterly and indisputably false and misleading.

18. Richey received ineffective assistance of appellate counsel because prior appellate counsel did not argue that the restricted manner in which Ohio applies Section 2929.05 violated Richey's due process rights and renders Ohio's capital sentencing system without adequate safeguards against the arbitrary and capricious imposition of the death penalty.

19. Richey received ineffective assistance of appellate counsel because prior appellate counsel did not [raise] to this Court that the State's failure to record the grand jury testimony deprived Richey of the ability to prove that Count I of his Indictment was constructively amended and that he was, therefore, deprived of his Ohio state and constitutional right to indictment by grand jury.

20. Richey received ineffective assistance of counsel because prior appellate counsel omitted substantial residual doubt evidence from its presentation to this Court.

21. Richey received ineffective assistance of appellate counsel in contravention of his constitutional rights because prior appellate counsel prejudicially omitted five core problems from its challenge to the facial constitutionality of Ohio's statutory death penalty law.

22. Richey received ineffective assistance of appellate counsel in contravention of his constitutional rights

(Respondent Ex. 65). On August 30, 1995, the Ohio Supreme Court affirmed the denial of Richey's application for the reasons stated in the Third District Court of Appeals' decision.[6] *State v. Richey*, 653 N.E.2d 344 (Ohio 1995). Although Richey petitioned for a writ of certiorari to the

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because prior appellate counsel failed to raise meritorious issues concerning trial counsel's constitutional ineffectiveness because one member of the original appellate counsel team put his allegiance to Richey's trial counsel ahead of defendant Richey's interests.

23. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court applied an incorrect standard for the level of proof required in a criminal case constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

24. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court considered evidence not in existence constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

25. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court did not engage in a meaningful proportionality review as required by Ohio Revised Code 2929.05 constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

[6] Justice Wright dissented for similar reasons to Justice Brown in Richey's direct appeal.

United States Supreme Court, the Court denied the petition on April 1, 1996. *Richey v. Ohio*, 517 U.S. 1119 (1996).

Shortly thereafter, Richey filed a petition for a post-conviction relief in the Putnam County Court of Common Pleas, raising nine claims for relief.[7] (Respondent Ex. 69).

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[7] These grounds for relief are:

> 1. The State's experts used unsound scientific principles, which caused them to give false testimony.
>
> 2. Trial counsel was ineffective because a defense retained expert was allegedly incompetent by failing to find that the fire was not caused by arson.
>
> 3. Trial counsel was ineffective for failing to adequately investigate the case by not searching for and finding a competent expert to rebut the State's arson evidence.
>
> 4. Trial counsel was ineffective for failing to present an expert to rebut the State's experts' testimony that the fire was caused by arson.
>
> 5. Appella[te] counsel was ineffective for failing to raise certain claims listed in Richey's Application for Reopening.
>
> 6. Trial counsel was ineffective at the guilt and penalty phases of Richey's trial.
>
> 7. Trial counsel was ineffective for failing to raise an alleged plea offer either as prosecutorial misconduct or as mitigation evidence at the penalty phase.
>
> 8. Trial counsel was ineffective for failing to elicit

After issuing its Findings of Fact and Conclusions of Law, the Court of Common Pleas dismissed Richey's post-conviction petition. (Respondent Ex. 73). Richey then appealed to the Third District Court of Appeals, raising three arguments.[8] The Third District affirmed the trial court's

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testimony on four different topics from a witness who testified at trial.

9. Trial counsel was ineffective for failing to include the entire letter that Richey wrote to his friend in Scotland or to secure an affidavit from "Gogs" to the effect that he had not been killed by Richey.

[8] Richey raised the following three assignments of error on appeal:

1. The State convicted Richey on the basis of false scientific testimony of arson which lacked any reliable scientific basis.

2. A competent expert would have concluded that, according to sound scientific principles, the physical evidence retrieved from the fire scene did not contain evidence of arson; to the contrary, the evidence was actually consistent with a fire caused by discard of smoking materials.

3. Competent counsel would have recognized that the expert hired to assist Richey was himself incompetent as a result of his decision not to conduct independent testing on the crucial physical evidence to verify the State expert's conclusion.

(Respondent Ex. 74)

decision on November 30, 1997. *State v. Richey*, No. 12-97-7. slip. op. (Ohio Ct. App. Nov. 18, 1997). Richey then appealed to the Ohio Supreme Court, raising four propositions of law.[9] On March 11, 1998, the Ohio Supreme Court dismissed Richey's appeal on the grounds that it did

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[9] Richey raised the following issues on appeal to the Ohio Supreme Court:

> 1. To present *prima facie* evidence of a constitutional violation based on actual innocence, a post-conviction petitioner need not "destroy" the State's case as presented at trial and need not prove his innocence with conclusive certainty; rather, it will suffice if he proffers new evidence establishing the scientific unreliability of the State's only evidence that a crime occurred.
>
> 2. A post-conviction claim is not procedurally barred by the doctrine of *res judicata* where new evidence outside the trial record shows that a constitutional violation has probably resulted in the conviction of one who is actually innocent.
>
> 3. Where a post-conviction petition presents *prima facie* evidence of a constitutional violation, a court cannot peremptorily decide the issue - R.C. 2953.21(E) requires that an evidentiary hearing must be conducted.
>
> 4. A trial court that relies upon its own personal knowledge in ruling on a post-conviction petition commits fundamental constitutional error.
>
> (Respondent Ex. 78).

not involve any substantial constitutional question. (Respondent Ex. 80).

Richey next filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with the Court on June 19, 1998. Because of the claim exhaustion requirement discussed, *infra*, Richey returned to state court on September 4, 1999 to file a second post-conviction petition. On January 24, 2000, the state trial court dismissed the petition on grounds that it was substantially based on the same issues raised in Richey's first post-conviction petition. (Amended Return of Writ at 17). The Third District Court of Appeals affirmed the trial court's decision on May 26, 2000. *State v. Richey*, No. 12-2000-03, 2000 WL 681642 (Ohio Ct. App. May 26, 2000). On July 10, 2000, Richey filed a Notice of Appeal and Memorandum of Opinion in Support of Jurisdiction with the Ohio Supreme Court. That court, however, declined jurisdiction on October 4, 2000. (Respondent Ex. 90.)

III. Habeas Proceeding

On June 19, 1998, petitioner filed the Petition for Writ of Habeas Corpus now pending before this Court. On June 25, 1998, the Court granted petitioner's Motion for Stay of Execution of Death Penalty Sentence pending decision on the instant Petition. The Court granted petitioner's Motion for Appointment of Counsel, admitting Paul E. Nemser and Kenneth J. Parsigian *pro hoc vice*, and appointing them to the case. On September 14, 1998 petitioner and respondent filed motions for discovery. The Court granted both motions.

Pursuant to General Order 99-18, this case was randomly reassigned to this Court on February 8, 1999. (Doc. No. 51.) Thereafter, petitioner filed a Motion to Stay the Pending Proceeding and/or Hold his Current Petition for Writ of Habeas Corpus in Abeyance to await the outcome of a second state post-conviction petition. This Court referred the

Motion to Magistrate Judge Streepy for a report and recommendation. Magistrate Judge Streepy recommended that the stay be denied without prejudice, permitting petitioner to re-file the Motion when and if the Ohio court decided to hear the post-conviction petition. This Court adopted Magistrate Judge Streepy's Report and Recommendation on November 19, 1999.

Petitioner then filed a Motion for an Evidentiary Hearing. Respondent opposed the Motion and the Court denied it on March 27, 2000. Additionally, the Court, pursuant to its authority under Rule 7 Governing Habeas Corpus Cases, expanded the record to include all discovery taken.[10] Thereafter, petitioner filed the Traverse and respondent filed a Response to the Traverse on August 22, 2000. On November 7, 2000, petitioner filed a Motion to Amend the Petition. This Motion entailed the addition of an exhausted claim following the denial of the second post-

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[10] This discovery, consisting of depositions and exhibits, included the following:

1. Deposition of Robert G. Cryer
2. Deposition of Laurence Gregory DuBois
3. Deposition of Dan Carl Gelfius
4. Deposition of Mohamed M. Gohar
5. Deposition of Leonard Heffner
6. Deposition of Roy Sargent
7. Deposition of Michael K. Simmons
8. Deposition of David Stebbins
9. Deposition of Steven J. Stechschulte
10. Deposition of Hope J. Sterling
11. Deposition of Marcia L. Wagoner
12. Fire Marshal Exhibits
13. Sheriff's Department Exhibits

conviction relief petition. Respondent filed a response but did not oppose the Motion and the Court granted petitioner's Motion. Thereafter, petitioner submitted an Amended petition and respondent submitted an Amended Return of Writ.

IV. Petitioner's Grounds for Relief

Petitioner asserts 27 claims for relief. The claims are as follows:

> 1. Because new evidence establishes that Richey was convicted on the basis of false and unreliable scientific testimony, Richey is actually innocent and his conviction and sentence violate the Eighth and Fourteenth Amendments.
>
> 2. To be convicted of aggravated murder under O.R.C. § 2903.01(B). the capital crime for which Richey was indicted, required proof of intent to cause the death of the person killed, and thus Richey's conviction based solely upon transferred intent violated his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.
>
> 3. Because the State indicted Richey for specifically intending to cause the death of Cynthia Collins, but instead tried Richey for specifically intending to cause the deaths of Candy Barchet and/or Mike Nichols, the State constructively amended Richey's indictment in violation of the Fourteenth Amendment.
>
> 4. The three-judge panel convicted Richey on a charge that the State did not include in its Bill of Particulars and on which the State did not present evidence at trial, thereby violating Richey's rights

under the Fifth, Sixth, Ninth and Fourteenth Amendments.

5. The State's failure to record the grand jury proceedings violated Richey's rights under the Fifth, Sixth and Fourteenth Amendments, and Richey was harmed as a result of this error because it deprived him of the ability to prove that Count I of the Indictment was constructively amended.

6. The charge against Richey of aggravated murder was technically defective, and resulted in an ambiguous verdict in violation of Richey's right to a unanimous verdict as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

7. Richey's due process rights under the Fifth and Fourteenth Amendments were violated when the trial court incorrectly informed Richey, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

8. Richey's rights under the Sixth and Fourteenth Amendments to trial by an impartial tribunal were violated when the three-judge panel failed to recuse themselves after they considered whether Richey was a menace and ordered him to be shackled prior to trial.

9. Because new scientific evidence establishes [that] Richey was convicted on the basis of false and unreliable scientific evidence, his conviction and sentence violates the Fourteenth Amendment.

10. There was insufficient evidence to convict Richey of the crimes with which he was charged or for which

he was tried, and thus Richey's conviction violated the Eighth and Fourteenth Amendments.

11. Richey was convicted on the basis of a standard of proof below that required by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

12. Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the State introduced irrelevant evidence that Richey allegedly made verbal threats against the prosecutor and potential witnesses.

13. The prosecution improperly called as a State witness a defense expert retained by Richey, in violation of the Fifth, Sixth and Fourteenth Amendments.

14. Prosecutorial misconduct during the trial phase of Richey's trial violated his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

15. Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the trial court admitted an irrelevant, inflammatory, and highly prejudicial letter in the presentence investigation report.

16. The three-judge panel's unsupported decision at sentencing to completely ignore Richey's compelling mitigation evidence deprived Richey of rights guaranteed under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

17. Because the three-judge panel improperly

required that Richey's mitigating factors "justify" rather than simply 'mitigate," Richey's rights as guaranteed by the Fifth. Sixth, Eighth, Ninth and Fourteenth Amendments were violated.

18. The three-judge panel's failure to consider all mitigating factors during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

19. The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

20. Richey received ineffective assistance of counsel during the guilt phase of his capital trial in violation of the Sixth and Fourteenth Amendments.

21. Even if each of the individual deficiencies of Richey's trial counsel's performance did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

22. Richey received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments.

23. Based upon record evidence, the sentence of death imposed upon Richey was inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

24. Based upon new evidence, the sentence of death imposed upon Richey is inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

25. The restricted manner in which Ohio applies its proportionality review violated Richey's due process rights under the Fifth and Fourteenth Amendments, and renders Ohio's capital sentencing system inadequate to safeguard against the arbitrary and capricious imposition of the death penalty.

26. Ohio's death penalty statute is unconstitutional because its proportionality review statute is arbitrarily and capriciously applied.

27. Richey's rights under the Fifth, Eighth, and Fourteenth Amendments were violated because other aspects of Ohio's death penalty statute are unconstitutional on their face and as applied to Richey.

28. The State violated Richey's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments when it failed to disclose material exculpatory evidence.

V. Standard of Review

The Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

Before interpreting this statute, this Court must determine whether it is applicable to the instant case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the United States Supreme Court held that amended § 2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. In *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999), the Sixth Circuit determined that a habeas case can only be "pending" for purposes of applying the AEDPA once the petition is filed. The court first determined that the word must be given its ordinary meaning. *Id.* at 1038 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court noted that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in § 2254 to support its finding. Specifically, § 2254(e) refers to "a proceeding instituted by an application

for a writ of habeas corpus." Moreover, section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $ 150, except that on an application for a writ of habeas corpus the filing fee shall be $5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case may only be "pending" after it commences, or after the filing of the petition. *Id.*

In the instant case, Richey filed his Petition June 19, 1998, over two years after the AEDPA's effective date. Consequently, this Court utilizes the standard of review set forth in amended 28 U.S.C. § 2254(d).

Recently, the United States Supreme Court interpreted this statute in *Williams (Terry) v. Taylor*, – U.S. – 120 S.Ct. 1495 (2000).[11] According to *Williams*, the phrases "contrary to" and "unreasonable application of" must be given independent meanings. *Id.* at 1511. A state court decision can be "contrary to" a Supreme Court decision by one of two means: (1) "if the state court arrives at a

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[11] This decision supplants the Sixth Circuits prior interpretations of the statute in *Nevers v. Killinger*, 169 F.3d 352, 361-62 (6th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999) and *Maurino v. Johnson*, 210 F.3d 638, 643-44 (6th Cir. 2000), *cert. denied*, – U.S. –, 121 S.Ct. 427 (2000). *See Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (holding that "[i]n light of the Supreme Court's decision in *Williams*, we find that *Nevers* and *Maurino* no longer correctly state the law on the issue of the appropriate standard under 28 U.S.C. § 2254(d).").

conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially distinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. *Id.* Because the word "contrary" "is commonly understood to mean "diametrically different, opposite in character or nature, or mutually opposed," the Court noted, § 2254 "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." *Id.* (citation omitted).

The Court then went on to find that a state court makes an "unreasonable application" of Supreme Court law, and thus a habeas court may grant relief, only if "the state court identifies the correct governing legal rule from this Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case" or if the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 1520. A fragmented Court also determined the "unreasonable application" language to mean something more than merely the state court's incorrect application of federal law. *Id.* at 1522. The Court noted that a reasonableness review of a state court decision involves an objective, rather than subjective review.

Finally, the *Williams* Court provided guidance on how to interpret "clearly established holdings of the Supreme Court." *Id.* at 1506. The Court stated that this statutory phrase "refers to holdings, as opposed to its dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* The *Williams* Court also looked to *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny to help guide federal courts as to what qualifies as 'clearly established Federal law." *Williams,* – U.S. – 120 S.Ct. at 1506. The Court opined that "[w]hatever would qualify as an 'old rule' under *Teague* will constitute 'clearly established Federal

Law, as determined by [this] Court'." *Id.* (citation omitted). Pursuant to *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government." 489 U.S. at 301.

## VI. Exhaustion and Procedural Default

### A. Exhaustion

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). Exhaustion is required once a state supreme court provides a convicted defendant an opportunity to review his or her claims on the merits. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If under state law there remains a remedy that petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust*, 17 F.3d at 160.

Respondent concedes in the Return of Writ that Richey has exhausted all claims as they were either properly raised on direct appeal, raised in post-conviction and barred from review based on *res judicata* grounds, or there is no remaining state remedy for his claims. Return of Writ at 32. Thus, the exhaustion doctrine does not prohibit habeas review of Richey's claims.

### B. Procedural Default

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved

on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim: "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-prong] analysis." *Id.* at 138. Specifically, the Sixth Circuit stated:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction . . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

*Id.* (citations omitted).

The respondent asserts that most all of the claims raised in the Petition are barred from review in this Court because they are procedurally defaulted.[12] Respondent asserts that these are valid procedural bars precluding this Court from affording the claim a merit review. Respondent asserts that the procedural default rests on one of three grounds: (1) res judicata bars a merit review pursuant to *State v. Perry*, 226 N.E.2d 104 (Ohio 1967) because the claim was first raised during post-conviction relief proceedings yet could have been raised on direct appeal; (2) res judicata bars a merit review pursuant to *State v. Perry* because the claim was first raised during petitioner's application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B); and (3) the petitioner did not make the proper objections during trial, thus, the Ohio Supreme Court reviewed the claim pursuant to a "plain error" analysis.

Each of the above grounds will be addressed below.

1. The *Perry* Rule

Ohio Rule of Appellate Procedure 16(A)(3) requires an appellant to include in his or her appellate brief "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Ohio R. App. P. 16(A)(3). In *State v. Perry*, 226 N.E.2d 104 (Ohio 1967). The Ohio Supreme Court ruled that:

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[12] Respondent alleges that petitioner has procedurally defaulted the following claims: 1, 2, 3, 4, part of 5, 6, 7, 8, 9, part of 10, 11, 12, 13, 15, part of 16, 17, part of 18, 19, part of 20, 22, part of 23, 24, part of 25, part of 26, part of 27, 28.

> Under the doctrine *of res judicata*, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.

*Id.* at 108; *see also Stale v. Roberts*, 437 N.E.2d 598, 601 (Ohio 1982) (holding policy behind *Perry* bars post-conviction petitioners from raising issues that could have been raised on direct appeal in a collateral proceeding to avoid reversal of conviction based on collateral, rather than constitutional, issues). Thus, unless a claim is based on evidence *dehors* or outside of the record, it must be raised during direct appeal. The Sixth Circuit has found this rule is an "adequate and independent state ground" pursuant to *Maupin* to bar a merit review of petitioner's claim for non-compliance with this rule. *See, e.g., Mapes v. Coyle*, 171 F.3d 408, 420 (6th Cir. 1999), *cert. denied*, 528 U.S. 946 (1999) (noting that the *Perry* rule has been consistently applied.)

One noted exception to the *Perry* doctrine, however, "occurs when ineffective assistance of counsel is alleged and the petitioner had the same counsel during trial and on direct appeal. Even in its broadest form, this exception encompasses only those claims for which evidence is not contained in the trial record." *Id.* (citing *State v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982)).

2. Ohio Rule of Appellate Procedure 26(B) and "Good Cause"

The Court will also address the defaulted status of several claims that respondent asserts, and Richey does not

dispute, counsel did not raise on direct appeal as is required pursuant to the doctrine created by *State v. Perry.*[13] Petitioner eventually did raise these claims in the context of ineffective assistance of appellate counsel when pursuing an application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B) (hereinafter "*Murnahan* proceeding" or "application to re-open"). The Ohio Court of Appeals rejected petitioner's application, holding that petitioner did not demonstrate sufficient "good cause" to escape the ninety-day filing requirement of 26(B).[14]

As stated above, the Sixth Circuit, pursuant to *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), requires a habeas court to undertake a four-prong analysis when determining the defaulted status of a claim. First, the Court must determine whether there is an applicable state procedural rule. For these claims, *Perry* provides such a rule. Next, the Court must determine whether this rule is enforced with

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[13] Richey does not fall into the *State v. Cole* exception to the *Perry* rule because he had different counsel during trial than on direct appeal.

[14] That rule states in pertinent part:

> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.
>
> Ohio R. App. P. 26(B)(1).

regularity and, if so, if it is an adequate and independent state procedural rule that would bar federal review. As stated above, the Sixth Circuit has determined that *Perry* is enforced with regularity and is an adequate state procedural rule. Finally, the Court must determine whether petitioner can establish sufficient cause and prejudice to excuse the default.

Petitioner alleges that he can satisfy both these requirements. First, petitioner asserts that the "cause" for procedurally defaulting these claims is ineffective assistance of appellate counsel. Courts have held that ineffective assistance of counsel, if proved, is sufficient to satisfy the cause prong and excuse procedural default. *See, e.g., White v. Schotten*, 201 F.3d 743 753 (6th Cir. 2000), *cert. denied*, – U.S.–. 121 S.Ct. 332 (2000) (holding appellate counsel ineffective and permitting district court to address merits of claim if petitioner could demonstrate prejudice): *Hollis v. Davis*, 912 F.2d 1343 (11th Cir. 1990), *cert. denied*, 503 U.S. 938 (1992) (determining counsel's ineffectiveness for failure to challenge racial composition of jury sufficient to establish cause to excuse procedural default).

The United States Supreme Court recently determined, however, that a petitioner may only use an ineffective assistance of counsel claim to establish cause if that separate ineffective assistance of counsel claim is, in itself, not procedurally defaulted. *Carpenter v. Edwards*, – U.S.–, 120 S.Ct. 1587 (2000). Thus, pursuant to *Carpenter*, a habeas petitioner must demonstrate either that the distinct ineffective assistance of counsel claim is not procedurally defaulted, or cause and prejudice to excuse the default for that claim.

In the instant case, Richey seemingly has defaulted his ineffective assistance of appellate counsel claim because he failed to file a timely application to reopen his direct appeal as Ohio Rule of Appellate Procedure 26(B) requires. When subjecting this rule to the *Maupin* analysis, however, the

defaulted status of this claim becomes less certain. Specifically, it is unclear whether Rule 26(B) is an adequate and independent state procedural rule to which this Court owes deference because it may not be regularly applied. A procedural rule is not "adequate," unless, among other things, it is regularly and consistently applied. *See Warner v. United States*, 975 F.2d 1207, 1213 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993) (stating that the rule only applies to "firmly established and regularly followed state practices" and citing *Ford* v. *Georgia*, 498 U.S. 411(1991)).

While the Sixth Circuit has yet to address this issue directly, it noted in *dicta* that "[a] review of the Ohio court of appeals cases . . . reveals that the state courts have not achieved consensus on what constitutes 'good cause' to excuse non-compliance with Rule 26(B)." *White v. Schotten*, 201 F.3d 743, 751 (2000). Indeed, the cases reveal inconsistencies in finding "good cause." *Compare State v. Houston*, 652 N.E.2d 1018 (Ohio 1995) (affirming appellate court's determination that *pro se* petitioner's assertion that he was denied access to trial transcript was not "good cause" for failing to file petition until one year after journalization of judgment) with *State v. Wright*, No. 93CA2110, 1994 WL 398805 (Ohio Ct. App. July 29, 1994) (holding state's failure to oppose petition constituted "good cause" to excuse ninety day requirement); *State v. Nitenson*, No. 91CA796, 1994 WL 69894 (Ohio Ct. App. Feb. 24, 1994)(determining courts have held *pro se* litigants to different standard than counsel and permitting merit review although petition flied one year after journalization of judgment). Consequently, the Court determines that, certainly as of the date Richey filed his Rule 26(B) application, the "good cause" rule had not yet been applied with the regularity necessary to constitute an adequate and independent state procedural rule.

Although respondent notes that in one unpublished opinion the Sixth Circuit affirmed a district court's finding that a petitioner had procedurally defaulted based on Rule

26(B), *Riggins v. Turner*, 110 F.3d 64 (Table), 1997 WL 144214 (6th Cir. Mar. 27, 1997), that case is of no avail. While the *Riggins* court did affirm the district court's procedural default finding based on the petitioner's failure to comply with Rule 26(8), it did so without commenting on the adequacy of that rule. Furthermore, the fact that *Riggins* is an unpublished opinion should do little to sway this Court as to its import. As the Sixth Circuit recently noted, unpublished opinions are not binding upon subsequent panels within the Circuit and, thus, have a less influential effect on this Court. *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000), *cert. denied*, – U.S. –, 121 S.Ct. 588 (2000). Consequently, the Court is constrained to find that Ohio Rule of Appellate Procedure 26(B) is not an adequate and independent state ground on which to find that petitioner has defaulted his ineffective assistance of appellate counsel claim. Petitioner may, therefore, assert that claim as "cause" to excuse the default of many of his claims.

The analysis does not end with this conclusion, however. Petitioner must demonstrate "that [he] received ineffective assistance of appellate counsel that rose to the level of a violation of [his] Sixth Amendment rights" to successfully assert this claim as cause and overcome the procedural default hurdle. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000). Specifically, petitioner must satisfy the two-prong test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in

counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. *364*, 372 (1993).

Petitioner asserts the facts on which he bases an ineffective assistance of appellate counsel claim in the twenty-second ground for relief but does not provide further factual support when addressing the defaulted status of each claim. Thus, the Court must look to petitioner's twenty-second ground for relief to extract a bases on which petitioner may successfully utilize this claim to excuse his procedural default. The Court determines that petitioner cannot utilize ineffective assistance of appellate counsel as cause to excuse procedural default because he cannot establish that counsel's behavior was objectively unreasonable.

Richey alleges ineffective assistance of appellate counsel in a two-step fashion: First, Richey contends there are numerous claims counsel failed to raise on direct appeal.[15] Second, Richey asserts that counsel failed to raise

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[15] Specifically, Richey alleges that appellate counsel failed to raise the following nineteen issues:

1) application of transferred intent theory
2) variance between the intent theories in the

indictment and evidence presented during trial

3) insufficient evidence to find intent to kill Cynthia Collins
4) difference in intent theories between the indictment and Bill of Particulars
5) insufficient evidence to prove that Richey formed a specific intent to kill Candy Barchet and/or Mike Nichols
6) the verdict was ambiguous and in violation of Richey's right to a unanimous verdict
7) Ohio's statutory definition of "reasonable doubt" falls below the standard required by the Ohio and federal constitutions
8) trial error to require Richey to waive right to jury trial one month before trial
9) state permitted to introduce irrelevant and prejudicial testimony
10) three-judge panel found that Richey pulled smoke detector from ceiling
11) residual doubt
12 three-judge panel required Richey to "justify" rather than "mitigate"
13) Ohio death penalty unconstitutional because it places an increased risk on capital defendants opting for trial
14) prejudice resulting from the introduction of the presentence investigation report
15) not enough ineffective assistance of counsel issues raised
16) prejudicial portion of letter introduced during trial
17) Ohio applies Ohio Rev. Code § 2929.05 without adequate safeguards
18) state's failure to record- grand jury proceedings
19) Ohio death penalty is facially unconstitutional

these claims because of a conflict of interest arising between trial counsel and the chief of the capital crimes section in the Ohio Public Defender's Commission. Specifically, one of Richey's appellate counsel, Kenneth Murray, contends that his supervisor, David Stebbins, ordered him to remove all ineffective assistance of trial counsel claims because of his friendship with William Kluge, Richey's trial counsel. (Murray Dep. at 50.)

Based on the discovery taken in this proceeding. Richey cannot prove that counsel's behavior was objectively unreasonable. Certainly, if the scenario Murray alleges were authenticated, counsel's behavior would satisfy the first *Strickland* prong. It is undoubtedly unreasonable for a supervisor to order the removal of colorable ineffective assistance of counsel claims merely because of a personal relationship with trial counsel. Richey is unable to prove this fact, however. In the depositions of both Murray and Stebbins, neither affirmatively state that the reason for Stebbins' request was because of his personal relationship with Kluge.

In Murray's deposition, he testified that Stebbins met with him on one occasion to request that he remove all ineffective assistance of counsel claims from his appellate brief. Although Murray indicated that he believed Stebbins' order was based on his friendship with Kluge,[16] Murray also

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[16] During the deposition the following exchange took place:

> Petitioner's Counsel: Did you believe when Mr. Stebbins directed you not to include ineffective assistance of counsel claims in Mr. Richey's direct appeal brief that the reason for Mr. Stebbins' directive was his friendship with Mr. Kluge?
>
> ***
>
> Murray: Yeah, that's what I thought was happening,

indicated that the stated reason at the time of their meeting was Stebbins' concern that these issues would be better supported by evidence outside the record. Therefore, raising them prematurely on direct appeal would bar a post-conviction review. (Murray Dep. at 28.) Similarly, while Stebbins revealed during his deposition that he had no independent recollection of his meeting with Murray on this case, he noted that the issue of when to raise ineffective assistance of counsel claims was, and remains, a difficult one to decipher. (Stebbins Dep. at 50.)

Thus, both agree that, at least facially, Stebbins' grounds for ordering the ineffective assistance of counsel claims be removed from the appellate brief are part of a tactical decision that would not run afoul of *Strickland.* Therefore, petitioner is unable to establish objectively unreasonable behavior pursuant to *Strickland.* The petitioner also cannot establish prejudice. That conclusion, however, will be explored more fully in examining petitioner's twenty-second ground for relief. For purposes of procedural default, the Court need only conclude here that petitioner may not utilize ineffective assistance of counsel to excuse it. All claims that were initially raised during petitioner's *Murnahan* application but should have been raised on direct appeal are procedurally barred.

3. Plain Error Review

Respondent also alleges that petitioner procedurally defaulted some of his claims because the Ohio Supreme Court addressed these claims pursuant to a plain error analysis. Richey responsively argues that although the Ohio

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that they were friends and he didn't want me to attack Bill in the brief. (Murray dep. at 50.)

Supreme Court may have invoked a plain error review, it then went on to address the claim on its merits. Thus, concludes Richey, the Ohio Supreme Court performed a merit review of the claim, entitling him to a similar review here. Richey further notes that pursuant to *Harris v. Reed,* 489 U.S. 255, 263 (1989), for a state court to bar federal review, it must "clearly and expressly" reject the claim on its merits. *Id.* Richey contends that because the Ohio Supreme Court performed a merit review, this was not a clear expression of the state court's intention to bar this Court from a habeas review of the claim.

The Sixth Circuit, however, teaches otherwise. In *Scott v. Mitchell,* 209 F.3d 854, 866 (6th Cir. 2000), the Sixth Circuit noted that an alternative holding in which the state court performs a plain error analysis, such as what the Ohio Supreme Court at times performed in the instant case, does not constitute a waiver of the state procedural bar preventing a habeas court from reviewing the claim. Moreover, in *Seymour v. Walker,* 224 F.3d 542, 557 (6th Cir. 2000), the court explicitly rejected Richey's assertion stating "[c]ontrolling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules." Thus, the Court finds that any claim in which the Ohio Supreme Court addresses a claim pursuant to a plain error analysis is procedurally defaulted. To be entitled to a merit review of those claims, petitioner must demonstrate cause and prejudice to excuse the default.

4. Miscarriage of Justice Exception

In addition to asserting cause and prejudice to save some of his claims from procedural default, Richey argues in the Traverse that because he is actually innocent, no procedural bars apply to any of his claims and he is entitled to a merit review. Pursuant to the miscarriage of justice exception to the procedural default bar, a habeas petitioner's

actual innocence of a crime entitles that petitioner to a merit review of his or her claims. *Schlup v. Delo,* 513 U.S. 298, 314-15 (1995). In *Schlup*, the Supreme Court determined that the petitioner should have been afforded a merit review of his claims after evidence suggested that he had been a victim of mistaken identity in the murder of a prison inmate. The Court went on to determine what standard would apply in instances which a habeas petitioner asserts actual innocence. Noting that it had decided a "trio of cases" dealing with the miscarriage of justice exception as applied to successive petitions, the Court explained the standards set forth in those cases. *Id.* at 320. In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Smith v. Murray*, 477 U.S. 527 (1986), the Court determined that "the petitioner must show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent . . . [and] that the petitioner would be required to establish by a 'fair probability' that 'the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.* at 322 (citations omitted).

Subsequently, in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), the Court revisited the miscarriage of justice exception, this time in the context of a petitioner who claimed he was "actually innocent of the death penalty." *Schlup*, 513 U.S. at 323. In addition to defining "actual innocence of the death penalty," the *Sawyer* Court disregarded the *Carrier* standard, articulating a more rigorous standard in which a petitioner "must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Id.* (internal quotation marks and citations omitted).

The *Schlup* Court then addressed the issue of whether the *carrier* or *Sawyer* standard applied in cases such as are presented here, where the petitioner seeks to utilize claims of actual innocence as a gateway to assert he was wrongly

convicted of the crime, rather than merely objecting to the death sentence, and should therefore escape the procedural default bar. The Court determined that the less stringent *Carrier* standard struck a fair balance between the state's concerns for finality and petitioner's allegations of trial error when the petitioner alleges that constitutional error resulted in the conviction of one who is actually innocent. *Id.* at 324. Pursuant to this standard, a habeas petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Carrier*, 477 U.S. at 496). To constitute the necessary "probability," the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* The *Schlup* court noted the specific analysis the district court must employ when faced with a petitioner's allegation of actual innocence:

> It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

*Id.* at 329.

Prior to the *Schlup* decision, the Supreme Court had decided a case in which the habeas petitioner raised his innocence as a "free-standing" claim, or one that did not relate to any trial error but asserted that the execution of an innocent person would *per se* violate the Fourteenth

Amendment. *See Herrera v. Collins*, 506 U.S. 390 (1993) (discussed in petitioner's first ground for relief, *infra).* The Court distinguished a *Herrera* actual innocence claim from the *Schlup* petitioner's actual innocence claim. An error free trial, the Court explained, is subject to a heightened degree of deference. Alternatively, a habeas petitioner who presents evidence of his innocence that is "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of the underlying claims." *Schlup,* 513 U.S. at 316.

A review of the new evidence Richey presents in this proceeding suggests that he does not meet the *Schlup* standard. In his Traverse, petitioner asserts that his newly acquired experts establish his actual innocence on several grounds. First, petitioner makes the statutory argument that Ohio Revised Code § 2903.01(D) prohibits a jury from convicting for aggravated murder unless the defendant "specifically intended to cause the death of the person killed." Traverse at 10. Because respondent does not dispute that there is no evidence suggesting Richey intended to cause Cynthia Collins' death, Richey claims that his conviction cannot survive the *Schlup* standard; that it is likely no reasonable juror would have found him guilty beyond a reasonable doubt.

This claim is inapplicable to an actual innocence claim under *Schlup. Schlup* permits a habeas petitioner armed with new facts supporting his or her innocence to demand a habeas court's review of such evidence under the *Carrier* standard. There is no room in *Schlup* for claims, such as petitioner presents here, that the trial court improperly applied state law. Such state law claims are not cognizable in habeas proceedings. A federal habeas court does not act as another state appellate court to review a state's implementation of its statutes. *Allen v. Morris,* 845 F.2d

610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011(1989). Accordingly, the Court finds this claim inapplicable to the miscarriage of justice exception.

Petitioner's next several claims of actual innocence attempt to undermine the scientific evidence of arson presented during trial. These claims correspond to the "new evidence" review mandated by *Schlup* and thus must be reviewed thoroughly then subjected to the *Carrier* "reasonable juror" standard. Petitioner first asserts that the affidavits and depositions of Dr. Andrew T. Armstrong, a Certified Professional Chemist specializing in forensic science and Professor L.P. Custer, a fire investigator, satisfy the *Schlup* standard. While both Armstrong arid Custer's depositions, discussed herein, cast doubt upon the state's evidence, they do not establish Richey's innocence so that, in all probability, no reasonable juror could convict. Accordingly, the Court determines that this evidence does not prevent a procedural bar to Richey's defaulted claims.

Before addressing petitioner's claims, this Court presents the following background information not elicited by the Ohio Supreme Court's factual findings: During trial, Dan Gelfius, a forensic chemist from the Ohio Arson Crime Lab (hereinafter "OACL"), testified that samples 4 and 7, carpet from Hope Collins' living room and wood from the apartment balcony, contained paint thinner, and sample 5, another living room carpet sample, contained gasoline. (Trial Tr. 836; Traverse at 13.) To identify these compounds, Gelfius used a chemical extraction procedure known as gas chromatography.[17] Unbeknownst to Gelfius, however, prior to testing, the carpet had been removed from the Collins

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[17] Chromatography is a method of separating and analyzing mixtures of chemical substances in an ascending molecular-weight sequence onto a solid adsorbent material. Dictionary of Scientific and Technical Terms, 293 (2d ed. 1978).

apartment and deposited at the county dump before the Fire Marshall's Office retrieved it a few weeks later. Additionally, once retrieved, the carpet was stored in the Sheriff's Department parking lot near gasoline pumps.

In his Traverse, Richey asserts that his experts can establish that the cause of the fire was accidental. In his deposition, Armstrong found that neither of the accelerants the state claimed were present on the living room carpet or wood decking samples were actually present. Specifically, Armstrong concluded that the chromatograms Gelfius produced when testing the carpet samples did not produce the classic "five peak component" necessary to identify gasoline or the clear resolution necessary to make such a determination)[18] (Armstrong Dep. at 47.) Additionally, Armstrong concluded that although the "five peak component" was not the standard[19] that the American Society for Testing Materials (hereinafter "ASTM") adopted until after 1986, it was fast becoming the standard at that time and was accepted generally by government and private laboratories during that period. Along with the subsequent adoption of that standard, petitioner notes, the ASTM indicated that gasoline can be easily confused with the remains of burned carpet. Thus, Armstrong concluded that it is impossible to determine whether gasoline was present on the carpet samples.

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[18] A peak is the maximum instantaneous value of a quantity. *Id.* In his deposition, Armstrong stated that the American Society for Testing Materials identifies gasoline using a "five peak component" pattern. (Armstrong Dep. at 47.) This standard was not defined, however, until 1986. *Id.*

[19] An accepted reference sample used for establishing a unit for measurement of a physical quantity. Dictionary of Scientific and Technical Terms, 1526 (2d ed. 1978).

Armstrong further concluded that the chromatograms Gelfius produced and identified as paint thinner contained normal alkanes,[20] which are found in paint thinner but may also be found in other household materials such as furniture polish, insecticides and glues. (Armstrong Dep. at 68.) Once again, Armstrong did not find that the state's evidence was sufficient to establish paint thinner was present on the carpet or deck wood with a degree of scientific certainty.

Petitioner also attacked the findings of Robert Cryer, the Assistant Fire Marshall who investigated the case. Cryer testified during trial that he found three indicia of arson: (1) "pour patterns," or areas of the living room carpet and wood deck on which it appeared some substance was poured; (2) the burning between the cracks in the deck; and (3) the quick, intense nature of the fire. (Trial Tr. 745.) During his deposition, Custer denied that any of the factors Cryer relied upon suggested that the fire's cause was anything but accidental. Instead, Custer determined that the "evidence" of arson Cryer had found at the scene was consistent with an accidental fire that reached "flash-over"[21] conditions. Custer stated that flash-over can occur in both accelerated and non-

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[20] A member of a series of saturated aliphatic hydrocarbons having the empirical formula $C_nH2_{n+2}$. *Id.* at 50.

[21] Custer defined the term "flash-over" during the course of his deposition:

> Q: * * * You talk about flash-over. Flash-over is the point at which temperatures reach a certain point in the room where other items in the room are going to be ignited just by the presence of that heat?
> A: By the presence of radiation.
> Q: Radiated heat?
> A: Radiated heat.
> (Custer Dep. at 50.)

accelerated fires. (Custer Dep. at 52-3.) He discounted the state's evidence of pour patterns on the rug, asserting that under the state's theory too much accelerant would need to be utilized to correspond with the state's pour pattern findings. Specifically, Custer claimed that it takes approximately one gallon of accelerant to produce one square foot of the irregularly shaped pattern on the carpet arid wood decking the state claimed was a pour pattern. Because the state identified approximately ten square feet of such a pattern, Custer maintained that the state's pour pattern theory was implausible. (Custer Dep. at 57-9.).

Custer further stated that gaps in the wood decking planks caused the irregular burn patterns Cryer had testified were indicative of accelerant use. Additionally, Custer discounted the theory that the speed of the fire was suggestive of accelerant use. (Custer Dep. at 80.) Custer opined that, generally, the rapidity of a fire is irrelevant to whether accelerants are used. *(Id.)* Rather, Custer determined that the cause of the fire was most likely a dropped cigarette that had smoldered in the couch for several hours or the result of Cynthia Collins' own play with matches. (Custer Dep. at 76.) Custer based his theories on the fact that Hope Collins was a smoker and an affidavit by a Collins neighbor, Peggy Villarreal, that Cynthia previously had played with matches, igniting a mattress. Finally, Custer found Cryer's assertion that the smoke detector had been dislodged prior to starting the fire to be speculative. Custer countered that the temperature that reached the ceiling could have been sufficient to melt or distort a properly secured smoke detector. (Petitioner Ex. 1 to the Petition.)

Petitioner's final means of attacking the state's arson theory was to assert that the evidence adduced during trial was wholly unreliable. During trial, Cryer testified that any concerns he had felt by the chain of evidence problem regarding the carpet were allayed by the fact that the OACL had identified the same paint thinner on both the carpet and

wood decking. During depositions of OACL employees Gohar and Gelfius, however, both stated that they could not determine whether the paint thinner was from the same brand. Thus, petitioner seeks to cast doubt on the accuracy of Cryer's testimony. Moreover, petitioner asserts that the retention time[22] that the OACL finds within an acceptable range varies as much as three minutes. Petitioner also asserts that Gohar and Gelfius could not agree during their depositions as to the proper method by which to identify gasoline and paint thinner from a chromatogram. Finally, petitioner asserts that DuBois' testimony is unreliable because he relied upon the same indicia of arson as Cryer. Because, as stated above, Custer refuted Cryer's testimony, DuBois' testimony similarly should be refuted.

Although the new factual evidence presented to the Court undermines some of the state's trial theory regarding arson, there are a multitude of reasons why this Court finds that the new factual evidence does not satisfy the *Schlup* standard. First, Armstrong asserted that Gelfius did not utilize the proper five peak standard to determine the presence of gasoline. In his deposition, however, Gelfius explained that he found the presence of gasoline based on standards of deteriorated gasoline he used in his lab. (Gelfius Dep. Vol I, at 104). These standards, Gelfius stated, were not identical to standards of "pure" gasoline but were standards he had obtained when exposing gasoline to intense heat, similar to what gasoline would look like after a fire. Thus, Gelfius explained why there might be some irregularities between the standard he used to detect gasoline and the five-peak standard now accepted as a standard gasoline

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[22] In gas chromatography, the time at which the center, or maximum, or a symmetrical peak occurs on a gas chromatogram. Dictionary of Scientific and Technical Terms, 1361 (2d ed. 1978).

chromatogram.

When questioned during his deposition regarding the presence of paint thinner, Gelfius agreed that paint thinner compounds are utilized in numerous household products, such as pesticides or lamp oils. Gelfius discounted the presence of the compound he viewed in the Richey case as anything other than paint thinner because in those samples there had been "quite a bit of pyrolysis"[23] which would typically be found only in compounds subject to halogenation,[24] unlike insecticides. (Gelfius Dep. Vol. II, at 261-62.) Gelfius also discounted lamp oils because the chemical composition of lamp oils differs noticeably from paint thinner. *Id.* at 262. Thus, Gelfius explained, at least partially, why some other household chemicals could not be confused with his identification of paint thinner.

Petitioner next seeks to discredit the testimony of Robert Cryer because Custer discredited the three bases on which he found the fire to be intentionally set: the "pour patterns," the irregular burning of the deck wood, and the speed with which the fire consumed the Collins apartment. During Custer's deposition, however, he admitted that he based his conclusions on a model in which no accelerants were used. (Custer Dep. at 37.) Custer also did no further factual investigation than rely on Armstrong's findings. Moreover, other scientists have found that the speed at which

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[23] The breaking apart of complex molecules into simpler units by the use of heat. Dictionary of Scientific and Technical Terms, 1296 (2d ed. 1978).

[24] A chemical process or reaction in which a halogen element is introduced into a substance, generally by the use of the element itself. Dictionary of Scientific and Technical Terms, 719 (2d ed. 1978).

the fire burns is indicative of accelerant use.[25] Thus, Custer's findings merely represent a difference in scientific opinion. Finally, as respondent points out in her sur-reply, while Custer maintained that the fire began by either a smoldering cigarette in the couch or child's play, Custer has never viewed the couch and does not know whether this theory is a plausible one. Custer's theory that Cynthia started the fire herself, the respondent asserts, would require a reasonable juror to believe that the child awoke at 4:00 a.m., set the fire in the living room, then returned to her bedroom to fall back to sleep. Although petitioner certainly would have been within his right to present such a theory at trial, this theory does not meet the *Schlup* requirement that a reasonable juror probably would, not have convicted petitioner based on this "new" information.

Similarly, while the petitioner attempts to subvert the evidence the state presented at trial, the evidence uncovered through discovery in this habeas proceeding does not meet the *Schlup* standard to excuse petitioner's procedural default. First, Richey correctly states that both Gohar and Gelfius stated during deposition that they could not identify specific brands of paint thinner in their chromatogram analysis. (Gelfius Dep. Vol. II at 204.) Richey next states that during trial, Cryer testified that the paint thinner from the deck and

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[25] *See, e.g.*, Café, Tony "The Science and 'Art' of Fire Investigation," Firepoint Magazine, Sept. 1998 at 2 ("Reports from fire fighters or eyewitnesses of a rapid fire or of suspicious odours can also indicate the presence of an accelerant."); Bertseh, Wolfgang "Chemical Analysis of Fire Debris: Was it Arson?" Analytical Chemistry, Sept. 1, 1996 at 541A ("A fire that appears to have multiple origins, suspicious burn patterns, an unusually high rate of spreading, or remnants of an ignition device is a primary candidate for arson.").

carpet were identical. Cryer's testimony, however, is not so clear cut. When questioned regarding the reliability of the carpet samples given its chain of evidence problems Cryer testified:

> Well, one thing about it, we have got paint thinner out on the patio which stayed there and we have got the same thing back in one spot on the carpet. So I would say those two – there is no question about those two are the same at the same time.
>
> If we had no positive sample from the patio or any other area, then it might be a little more reasonable to believe that the possibility could go either way.

(Tr. Trans. at 806.) It is somewhat ambiguous whether Cryer is attempting to testify that the paint thinner *brands* were identical or whether he is merely trying to convey that the presence of paint thinner was found both on the carpet and the wood deck. Richey also fails to note that defense counsel amply pointed out that the carpet's whereabouts undermined Cryer's findings:

> Defense counsel: Well, now, suppose it is out at the dump and buried underneath a pile of trash and there is a can of gasoline or can of paint thinner and it drips on the carpet. There would be no way for you to discern whether that accelerant came from the dump or whether that accelerant was there before.
>
> Cryer: No, sir.

Defense counsel: No further questions.

(Tr. Trans. at 807.) Thus. defense counsel amply highlighted during trial the possibility that the carpet was tainted through its prior locations. Because Richey can neither affirmatively demonstrate that Cryer's testimony was based on the paint thinner brand identification, and because trial counsel amply underscored the chain of evidence problems with the carpet, he does not demonstrate that a reasonable juror probably would have acquitted him based on "new" evidence.

Richey also makes much of the fact that Gelfius and Gohar could not identify the gasoline and paint thinner from the same peaks in the chromatogram. This point is irrelevant, however, because Gelfius was the sole witness from the OACL to testify during trial. Thus, because the three-judge panel's decision was based on his testimony alone, the fact that he and Gohar cannot now agree on how to identify gasoline and paint thinner is beside the point. Petitioner does not now allege that Gelfius' testimony contradicts what was presented to the jury. Thus, this "evidence" is not new and already was considered during trial.

Finally, Richey takes issue with the fact that DuBois utilized the same faulty mechanisms for determining the fire was set purposefully as did Cryer. Because Custer was able to undermine Cryer's reasoning. DuBois' testimony should likewise be undermined. As noted above, however, Custer's theories are not settled principles among forensic scientists. Moreover, during deposition, DuBois stated that he reached his own, independent conclusions regarding the presence of accelerants after fully discussing and analyzing Gelfius' findings. (DuBois Dep. at 109.) Finally, DuBois did not rely specifically on Cryer's findings when concluding the fire was purposefully set. When asked during deposition whether he considered an accidental cause to the fire he responded affirmatively, but ruled out that possibility because:

> In particular, [he] had looked at some appliances that had been removed from the home that could have been an accidental cause of the fire. A malfunction of one of these appliances may have caused an electrical fire in particular. Those did not show any evidence that they had caused the fire.
>
> In addition, [he] had photographs that showed . . . burn patterns that were consistent with an accelerant-induced fire and not an accidentally caused fire. And [he] had laboratory analyses that indicated . . . that there was an accelerant present in those samples.

(DuBois Dep. at 130.) Thus, DuBois relied on indicia of arson other than Cryer's three factors to determine that this was an arson fire.

Taken cumulatively, the new evidence supplied during discovery in this case does undermine the scientific findings presented at trial. This evidence does not, however, fully exonerate Richey nor reveal facts affirmatively supporting his innocence. In fact, Richey does little to refute the sizable lay testimony adduced during trial that he had threatened to burn down "A" Building that evening. This lay testimony coupled with the scientific evidence presented during trial could have permitted a reasonable juror to convict even if Richey had presented his own expert testimony during trial. Accordingly, petitioner does not meet the *Schlup* standard and will not be permitted to escape procedural default pursuant to the miscarriage of justice exception.

VII. Analysis of Petitioner's Claims[26]

Ground 1: Because new evidence establishes that Richey was convicted on the basis of false and unreliable scientific testimony, Richey is actually innocent and his conviction and sentence violate the Eighth and Fourteenth Amendments.

Initially, the Court notes that this claim is not procedurally defaulted. Although it was first raised to the trial court during post-conviction relief proceedings and barred as *res judicata*, the Court of Appeals addressed this claim on the merits on appeal. Thus, the Court addresses the merits of this claim.

In his first ground for relief, Richey contends that he is not guilty of the underlying conviction for which he received the death penalty, thus his execution would violate the Eighth and Fourteenth Amendments. Like his procedural default actual innocence claim, Richey asserts that the "new evidence" presented by his experts during habeas discovery affirmatively demonstrates his innocence. Specifically, Richey contends that Armstrong's finding that no accelerants were present and Custer's determination that Cryer's reasoning was faulty led the panel to conclude that the fire's cause was arson.

Although Richey alleges that his experts' testimony will prove he is "actually innocent" of the Collins murder, it remains unclear whether an actual innocence claim is available to a habeas petitioner. To support his claim, Richey cites *Herrera v. Collins*, 506 U.S. 390 (1993). In that case, the petitioner alleged, as here, that newly acquired evidence

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[26] Each of petitioner's claims is set forth in bold at the beginning of the discussion of that claim.

would exonerate him of the crime of which he was convicted. The petitioner argued that because he was innocent, his execution would offend the Eighth and Fourteenth Amendments of the Constitution. *Id.* at 398. The Court noted that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. At the close of the opinion, however, the Court reasoned, *arguendo*, that the execution of a truly innocent person would violate the Constitution, but opined that the threshold showing for such a case "would necessarily be extraordinarily high." *Id.* at 417. Finding that Herrera did not meet this abstract standard, the Court denied his actual innocence claim.

In the wake of *Herrera*, Circuit courts, unsurprisingly, have divided on whether to recognize a habeas petitioner's "free-standing" actual innocence claim, in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), for example the Ninth Circuit held that *Herrera* did recognize this claim. Adopting the *Herrera* dissent's standard for proving actual innocence, the Ninth Circuit determined that a habeas petitioner 'must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Id. at 476 (citing *Herrara*, 506 U.S. at 442-44). Other circuits, however, have determined that the *Herrera* Court never held free-standing actual innocence claims were cognizable in a habeas review, and merely assumed that the execution of an innocent person would be constitutionally violative for argument's sake. *See, e.g., Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998) (holding free-standing actual innocence claim not a basis for obtaining a writ of habeas corpus); *Lucas v Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998) (holding language throughout *Herrera* opinion denying habeas petitioner's right to freestanding actual innocence claim controlling).

While the Sixth Circuit has yet to provide definitive guidance on whether a freestanding actual innocence claim is cognizable, it has noted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Lefever v. Money*, 225 F.3d 659 (Table), 2000 WL 977305. at *6 (6th Cir. July 6, 2000) (quoting *Herrera*,, 506 U.S. at 400). The court then went on to note that the *Lefever* petitioner's case also did not fall into the purported "*Herrera* exception" in which, as noted above, the Supreme Court theorized that the execution of a truly innocent person would be unconstitutional. *Id.* at *6 n.19.[27]

The Sixth Circuit found that assuming such an exception exists, the petitioner did not satisfy that "extraordinarily high" standard in that case. Rather than presenting new evidence, the court noted in *dicta*, the petitioner's "new evidence" was merely a reevaluation of the evidence presented during trial by experts of petitioner's choosing. The court went on to note that

> [w]hile defendant blames her trial counsel for failing to hire these experts and failing to bring out each and every medical point they have brought out years after her trial, this does not change the fact that the evidence does not likely constitute "newly discovered

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[27] One other district court within the Northern District of Ohio has determined that *Herrera* barred free-standing actual innocence claims. *Spirko v. Anderson*, No. 3:95CV7209, 2000 WL 1278383, at *19 (N.D. Ohio July 11, 2000). In that case, the court opined that a habeas court's sole responsibility lies in ensuring the state afforded the petitioner a constitutionally sound trial, not to correct errors of fact. *Id.* at *20.

> evidence," the type of evidence that may, in some circumstances, entitle a habeas applicant to an evidentiary hearing.

*Id.* at *6 n.18.

Similarly, Richey does not present new evidence but has merely employed new experts to examine the evidence the state adduced at trial. As he cannot prevail on a *Schlup* "gateway" actual innocence claim requiring a lower threshold of proof to meet the standard, then, *a fortiori*, Richey does not meet the theoretical "extraordinarily high" *Herrera* freestanding actual innocence claim, provided such a claim exists.

Finally, as respondent notes, this claim, as all others, is subject to a "reasonableness" review pursuant to § 2254(d)(1). Thus, pursuant to *Williams v. Taylor*, discussed *supra*, the Court must determine whether the Ohio Court of Appeals' decision was "contrary to, or involved an unreasonable application of clearly established Federal law." § 2254(d)(l). The Third District Court of Appeals determined:

> [A]ppelant does not establish a claim of actual innocence based upon his so-called "newly discovered evidence.' Even if the trial experts' analysis of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury. Thus, we conclude that Appellant does not present a claim of actual innocence.

*State v. Richey*, No. 12-97-7, 1997 WL 722782. at *1 (Ohio Ct. App. Nov. 18, 1997). Because the Third District Court of Appeals did not unreasonably apply Supreme Court law, i.e., *Herrera*, to the facts of the case, this Court must defer to it. Consequently, the Court finds that Richey's first ground for relief is not well-taken.

Ground 2: To be convicted of aggravated murder under O.R.C. § 2903.01(B), the capital crime for which Richey was indicted, required proof of intent to cause the death of the person killed, and thus Richey's conviction based solely upon transferred intent violated his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments.

In this claim Richey asserts that the state unlawfully convicted him on a theory of transferred intent. Richey initially raised this claim during his *Murnahan* application. For the reasons stated in section VI. B. 2, *supra*, Richey has procedurally defaulted this claim.[28]

Out of an abundance of caution, however, the Court will consider the merits of this claim. In this claim, petitioner

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[28] In the Return of Writ, respondent correctly states that it is difficult to discern the nature of this claim. Respondent, and apparently petitioner, dealt with this claim as one regarding the sufficiency of the state's proof to convict Richey of capital murder. As respondent notes, however, this claim may be construed as a faulty indictment claim. The claim remains defaulted regardless of how the Court chooses to interpret petitioner's claim, however, because a defendant must raise faulty indictment objections prior to trial. Ohio R. Crim. P. 12(B)(2).

asserts that pursuant to Ohio Revised Code § 2903.01(D) a criminal defendant cannot be convicted of aggravated murder unless he murdered the person he intended to at the outset. The Ohio legislature amended this section in 1996. The section in effect during Richey's trial stated in pertinent part:

> (B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> * * *
>
> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * * If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the **prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death**

> **of the person killed**, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

Ohio Rev. Code § 2903.01 (emphasis supplied). The petitioner focuses on the emboldened language to assert that Ohio no longer recognizes the theory of transferred intent, but that the state must prove that a defendant intended to kill the actual victim to obtain an aggravated murder conviction.

Moreover, petitioner contends that because the indictment under which Richey was charged does not contain an allegation that Richey intended to kill Cynthia Collins, and because the state did not adduce, and admittedly cannot produce any evidence that Richey harbored an intent to kill Cynthia Collins rather than Candy Barchet and Mike Nichols, he is entitled to federal habeas relief.

As stated in the above procedural default analysis, the Court finds that this claim is not cognizable in a federal habeas court as it is one touching purely on state law. As the Sixth Circuit has stated, "[i]n a federal habeas corpus proceeding such as this one, we do not sit as a "'super' state supreme court" to judge whether the judge erred under state law. Rather, our task is to determine whether the violation rises to the level of a constitutional wrong." *Wilson v. McMacken*, 786 F.2d 216, 221 (6th Cir. 1986). *See also Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)(holding habeas court must defer to state's own interpretation of state law); *Duffy v. Foltz*, 804 F.2d 50, 54 (6th Cir. 1986)(same).

In a factually similar case, the Seventh Circuit determined that the petitioner's claims that the state had abolished the theory of transferred intent was an issue best decided by the state. *Gilreath v. Hanks*, 95 F.3d 1154 (Table), 1996 WL 459929, at * 1 (7th Cir. Aug. 8, 1996). Although the court determined that the petitioner might have had a constitutional claim had the state convicted him for acts that were not criminal pursuant to state law, that was not the

case. *Id.* Similarly, Richey cannot argue persuasively that Ohio has abandoned the transferred intent theory when the Ohio Supreme Court explicitly stated in his case that it has not. Consequently, the Court determines that even if Richey had properly preserved his second ground for relief, it would not be cognizable in a federal habeas forum. In the context of addressing Richey's sufficiency of evidence claim, the Ohio Supreme Court explicitly stated that "[t]he doctrine of transferred intent is firmly rooted in Ohio law." 595 N.E.2d 915, 925 (Ohio 1992)(internal quotation marks and citations omitted.) Thus, the Court finds Richey's second ground for relief has no merit.

Ground 3: Because the State indicted Richey for specifically intending to cause the death of Cynthia Collins, but instead tried Richey for specifically intending to cause the deaths of Candy Barchet and/or Mike Nichols, the State constructively amended Richey's indictment in violation of the Fourteenth Amendment.

Ground 4: The three-judge panel convicted Richey on a charge that the State did not include in the Bill of Particulars and on which the State did not present evidence at trial, thereby violating Richey's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

In his third and fourth grounds for relief. Richey contends that the state violated his constitutional rights because he was not convicted of the crime with which he was charged. Specifically, Richey alleges that while the indictment charged him with the specific intent to kill Cynthia Collins, the Bill of Particulars charged him with the specific intent to kill Candy Barchet and/or Mike Nichols. Because he was indicted on one theory of intent but

convicted for another, Richey asserts this was an unconstitutional constructive amendment to the indictment. Moreover, Richey argues he did not have sufficient notice of which theory of intent the state meant to prove during trial, thus, he could not adequately prepare for his defense.

Similar to the second ground for relief, respondent argues that claims three and four are procedurally defaulted because they were not raised on direct appeal. Instead, they were raised for the first time during petitioner's *Murnahan* petition. Richey counters that ineffective assistance of appellate counsel provides the "cause" necessary to excuse this procedural default. As stated above, however, Richey cannot successfully assert this claim. Therefore, these claims are procedurally defaulted.

In performing a merit review of a constructive amendment to an indictment claim, a habeas court must be mindful of several factors. In *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), the state had indicted the petitioner on first-degree premeditated murder. During trial, however, the state presented evidence of felony murder. After defense counsel's objections, the trial court charged the jury only on premeditated murder. In reversing the district court's denial of the writ, the Sixth Circuit held the presentment of felony murder evidence was a constructive amendment that impermissibly prejudiced the petitioner even though the court charged only on premeditated murder.

The Sixth Circuit noted that constructive amendment prohibition rests on the Fifth Amendment right to a grand jury indictment before one can be held for a capital trial. *Id.* at 336. Because this Fifth Amendment guarantee has never been incorporated into the Fourth Amendment, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not require a grand jury indictment in a state prosecution. *Id.* at 337 (citing *Hurtado v. California*, 110 U.S. 516 (1884)). Thus, the court concluded, "with respect to amendments, federal courts have viewed [an

indictment's] legality as primarily a matter of state law." *Id.* (internal quotation marks and citations omitted).

Accordingly, the *Watson* court examined Ohio's indictment amendment law, which is detailed in Ohio Revised Code § 2941.30.[29] From that portion of the statute the Sixth Circuit concluded that the state had constructively amended the indictment because premeditated murder was a separate crime from felony murder.

The court went on to note that although a habeas court must entertain a constructive amendment claim by ascertaining state law, this issue is grounded in three basic federal constitutional principles: notice, double jeopardy, and effective assistance of counsel. Thus, this Court need only consider whether the faulty indictment violated these federal law guarantees.

To be on firm constitutional ground, an indictment must pass a two-prong test:

> [F]irst, the indictment must set out all of the elements of the charged offense and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on

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[29] That statute reads:

> The court may at any time before, during, or after a trial amend the indictment, information, or bill of particular, in respect to any defect, imperfection, or omission in form of substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *

Ohio Rev. Code § 2941.30.

the same facts.

*United States v. Martinez*, 981 F.2d 867, 872 (6th Cir. 1992)(citing *Russell v. United States*, 369 U.S. 749, 763-64 (1962)). "The state legislature's definition of the elements of the offense is usually dispositive." *Hoover v. Garfield Heights Mun. Court*, 802 F.2d 168, 173 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987). Moreover, criminal defense counsel must be sufficiently apprized of the offense with which his client is charged to enable counsel to adequately prepare a meaningful defense. *See Olsen v McFaul*, 843 F.2d 918, 931 (6th Cir. 1988)(determining vague indictment and numerous state alterations to it did not permit defense counsel to comprehend factual circumstances surrounding charge).

As instructed by *Watson*, this Court must look to state law to determine the validity of petitioner's constructive amendment arguments. In addition to the indictment amendment statute quoted above, the Court examines the crime with which Richey was charged, felony murder, to determine whether the indictment was constructively amended by the proofs supplied during trial. The elements of aggravated murder at the time Richey was convicted were:

> (1) Purposefully causing another's death.
>
> (2) while committing * * *
>
> (3) Kidnaping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary or escape.

*State v. Richey*, No. 12-87-2, 1989 WL 156562, at *2 (Ohio Ct. App. Dec. 28, 1989)(quoting Ohio Revised Code § 2903.01(B)). Upon reviewing the statute, it appears that petitioner's claim is essentially that the state did not provide

sufficient notice of the means by which it would prove the "purposefully" or state of mind element of the crime.

In Richey's case, the indictment stated that Richey "did purposely cause the death of another, to wit: Cynthia Collins." (Respondent Ex. 1.) Several months prior to the commencement of trial, however, Richey's counsel requested a bill of particulars pursuant to Ohio Rule of Criminal Procedure 7(E) . This bill not only provided petitioner with the factual circumstances the state intended to prove during its case, but noted that:

> Kenneth Richey at the time that he was committing an aggravated arson was attempting to cause the death of Candy Barchet and Mike Nichols who were in the apartment immediately below the apartment of Hope Collins. The purpose to cause the death of another, to wit: Cynthia Collins arises from the intent of the Defendant to cause the death of Candy Barchet and/or Mike Nichols.

(Respondent Ex. 10.)

This Court is satisfied that Richey's indictment was not unconstitutionally amended. First, the Court notes that, pursuant to Ohio law, the doctrine of transferred intent is a permissible means by which the state can prove the "purposefully" element to aggravated murder. *See State v. Sowell,* 530 N.E.2d 1294, 1305 (Ohio 1988) (holding indictment accurate in conviction for murder with prior calculation and design under theory of transferred intent); *see also State v. Smith,* 624 N.E.2d 1114, 1116 (Ohio 1993)(finding "purposefully" element of murder proved by either theory of specific or transferred intent). Thus, pursuant to state law, an indictment is not "amended" when the state chooses to satisfy the "purposeful" element by transferred intent rather than specific intent to kill the victim.

Additionally, the federal rights violations that inhere

in a constructive amendment to an indictment are not present here. First, the crime with which Richey was charged, unlike the *Watson* petitioner, at all times was aggravated murder with a felony-murder death penalty specification. Moreover, the state filed the bill of particulars on July 24, 1986 but petitioner's trial did not begin until January 5, 1987. Thus, Richey and his counsel were well aware that the state intended to pursue a transferred intent theory at trial. Finally, based on the defense Richey's counsel provided, it was clear that counsel knew, and prepared for, a defense based on a transferred intent theory.

During the state's opening argument, the state clearly set forth its transferred intent theory by noting that Richey had an "obsessive" relationship with Candy Barchet. (Tr. Trans. at 23.) Defense counsel rebutted this inference by attacking the credibility of the people who attended the Collins party. Defense counsel also cross-examined Hope Collins, eliciting testimony that Richey was not overtly upset when Barchet ended their relationship. Based on these defense tactics, it is clear that Richey was on notice, and defense counsel prepared a defense based on the state's transferred intent theory. As such, the Court finds that Richey and his counsel were on notice of the means by which the state would attempt to prove the "purposeful" element of the crime. Because Richey's federal rights were not violated; the Court concludes that grounds three and four are not well-taken.[30]

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[30] While raised in neither parties' briefs, the United States Supreme Court's recent opinion in *Apprendi v. New Jersey,* – U.S. –, 120 5.0. 2348 (2000), will be addressed and distinguished. In *Apprendi,* the Court concluded because New Jersey increased a defendant's sentence once it determined that the crime for which a defendant was convicted was motived by racial bias that this was a sentence enhancement that is an unconstitutional amendment to an

Ground 5: The State's failure to record the grand jury proceedings violated Richey's rights under the Fifth, Sixth and Fourteenth Amendments, and Richey was harmed as a result of this error because it deprived him of the ability to prove that Count 1 of the Indictment was constructively amended.

In his fifth ground for relief, Richey contends that the state's failure to record the grand jury proceeding prejudiced him because it was the means by which Richey could prove the state constructively amended Count 1 of the indictment. Additionally, Richey contends that numerous eyewitness

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indictment. The *Apprendi* Court held that "[o]ther than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2356.

In one recent Northern District of Ohio opinion the court granted a writ of habeas corpus to a habeas petitioner whose conviction rested on a faulty indictment. *Esparza v. Anderson*, No. 3:96CV7434 (N.D. Ohio Oct. 13, 2000). In that case, the faulty indictment omitted language that raised an aggravated murder charge pursuant to Ohio Rev. Code § 2903.01(B), which is punishable by life imprisonment, to a conviction in which the petitioner became death-penalty eligible.

It is obvious that neither case has applicability in Richey's faulty indictment allegations. Whether the state obtained a conviction based on Richey's specific intent to kill Cynthia Collins to a theory of transferred intent, the death penalty was correctly identified in the indictment and proved beyond a reasonable doubt during trial.

testimony procured during the grand jury proceeding was subsequently found persuasive by the three-judge panel. Thus, Richey alleges, without further explanation, their grand jury testimony was important to the defense.

The Ohio Supreme Court partially addressed this claim on direct appeal. In Proposition of Law XIII, Richey asserted that grand jury testimony was important to the defense to explore the possibility of inconsistent eyewitness testimony. The Ohio Supreme Court was unpersuaded by this claim. In its opinion the court noted:

> Richey establishes no basis at trial for any particularized need, and his general assertions do not establish a particularized need now. 'Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and theme is a showing by the defense that a particularized need for disclosure exists * * *.' *State v. Greer* (1981), 66 Ohio St. 2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

*State v. Richey*, 595 N.E.2d 915, 927 (Ohio 1992). Thus, the Ohio Supreme Court already has partially rejected Richey's claim.

This claim ultimately must fail, however, because Richey asserts no claim cognizable for federal habeas relief. To be entitled to relief, a federal habeas petitioner must allege a violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2241; *Pulley v. Harris*, 465 U.S. 37, 41 (1984). In the instant case, Richey makes no such claim. Although Richey correctly notes that Ohio law requires the recordation of grand jury proceedings in felony cases, *State v. Grewell*, 543 N.E.2d 93, 98 (Ohio 1989), that decision was based purely on Ohio Rule of Criminal Procedure 22. The *Grewell* court noted that its decision

specifically did not rest on federal constitutional grounds. *Id.* at 97. Moreover, the Sixth Circuit has stated that although it is the preferred practice in federal courts to record grand jury hearings, neither the Constitution nor any federal statute require it. *United States v. Battisti*, 486 F.2d 961, 963 (6th Cir. 1973). *See also United States v. Barone*, 584 F.2d 118, 125 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)(noting no federal mandate to record proceedings); *United States v. Perkins*, 383 F. Supp. 922, 929 (N.D. Ohio 1974)(same). Because Richey's Fifth Ground for Relief does not involve a federal law violation, this Court finds it is not well-taken.

Ground 6: The charge against Richey of aggravated murder was technically defective, and resulted in ambiguous verdict in violation of Richey's right to a unanimous verdict as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

In his sixth ground for relief, Richey asserts that his right to a unanimous verdict was infringed because of the discrepancy between the indictment, bill of particulars, and the verdict as to the theory of intent under which the state tried him for aggravated murder. Because the verdict does not indicate the panel reached a unanimous decision on whom Richey intended to kill Richey asserts, he cannot be convicted pursuant to the aggravated murder statute. He claims that, pursuant to state statute, he cannot be indicted and convicted for specifically intending to kill Cynthia Collins when the bill of particulars alleged a transferred intent theory.[31]

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[31] Richey's indictment and bill of particulars were quoted *supra* at 60-61. The verdict reads in relevant part:

Respondent alleges this claim is procedurally defaulted because petitioner raised this claim for the first time during his *Murnahan* proceeding. As stated above, Richey asserts ineffective assistance of appellate counsel as "cause" to excuse this default but cannot successfully do so. Consequently, this claim is procedurally defaulted.

The Court notes that, as stated above, any alleged irregularities pursuant to state law cannot be redressed in this proceeding. Any federal concerns raised by the discrepancy between the indictment and bill of particulars were raised and decided *supra* in grounds three and four. Thus, the Court need only address the issue of whether the verdict unanimously convicted Richey of aggravated murder in this ground for relief.

The United States Supreme Court addressed the unanimity issue in *Schad v. Arizona*, 501 U.S. 624, 632 (1991). The Court held that a jury is not required to specifically find under which theory of mens rea it rested its conviction. In that case, the state alleged during trial that the defendant was guilty of murder either under a premeditation theory or a felony murder theory. The defense rested on the strategy that the state had proved, at most, that the defendant

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> The defendant, Kenneth Richey, having been found guilty beyond a reasonable doubt on January 8, 1987, of Count One of the Indictment, Aggravated Murder, R.C. 2903.01(B), to wit: that on or about June 30, 1986 and in Putnam County, Ohio, that Kenneth Richey did purposely and with specific intent cause the death of another, to wit Cynthia Collins, while committing or attempting to commit, or while fleeing immediately after committing, or attempting to commit an Aggravated Arson, R.C. 2929.02(A)(I).

Respondent Ex. 44.

committed robbery. On appeal, the Court concluded that the petitioner had wrongly framed the issue, asserting that his right to a unanimous jury verdict had been violated when, in fact, the issue was whether it is constitutionally permissible for a jury to reach a unanimous verdict based on alternative findings. *Id.* at 630. The Court answered the question in the affirmative. Noting prior jurisprudence that permitted a jury to convict on alternate theories of the criminal act, the Court found "no reason . . . why the rule that the jury need not agree as to mere means of satisfying the actus reus element of an offense should not apply equally to alternative means of satisfying the element of mens rea." *Id.* at 632. Accordingly, the Court upheld the conviction.

Similarly, Richey's conviction will stand. Although Richey attempts to raise this issue as one consisting of a non-unanimous verdict, the true issue, as in *Schad*, is whether the panel could permissibly convict Richey on a transferred intent, rather than a specific intent theory. The Supreme Court has concluded it may. Thus, the Court determines that Richey's sixth ground for relief is without merit.

Ground 7: Richey's due process rights under the Fifth and Fourteenth Amendments were violated when the trial court incorrectly informed Richey, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

In Richey's seventh ground for relief, he contends that his due process rights were violated because he was denied the right to a jury trial. Richey essentially argues two issues in this ground for relief: First, he maintains that his jury waiver was not "knowing, voluntary or intelligent" because the presiding judge never told him that a single juror could prevent the death penalty. Second, Richey asserts that he was unconstitutionally coerced into waiving his jury trial

rights when the presiding trial judge informed him during a December 12, 1986 hearing that he would have to decide that day whether or not he would withdraw his jury waiver.

Respondent alleges this claim is procedurally defaulted because Richey first raised it during his *Murnahan* proceedings. As stated in section VI., B., 2, *supra*, this Court agrees.

An intelligent and voluntary waiver of the right to a jury trial is valid, and a conviction obtained after such a waiver is not constitutionally infirm. *Sinistaj v. Burt*, 66 F.3d 804, 807 (6th Cir. 1995)(citing *Patton v. United States*, 281 U.S. 276 (1930)). "[A] trial court need not conduct a particularly detailed oral inquiry before finding that a waiver is knowing and voluntary." *Cooey v. Anderson*, 988 F. Supp. 1066, 1078 (N.D. Ohio 1997)(citing *United States v. Martin*, 704 F.2d 267 (6th Cir. 1983) and holding that "there is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial waiver."). Rather, the trial court should merely "inform defendants of the benefits and burdens of waiving one's right to jury trial." *Cooey*, 988 F. Supp. at 1079.[32]

During a December 12th hearing, the court informed Richey of the rights he was waiving:

The Court: As it relates to a waiver of a jury, I take it on behalf of the Defense that you have explained

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[32] The Sixth Circuit suggested, but did not demand, that "a defendant . . . be informed that a jury is composed of 12 members of the community, [that] he may participate in the selection of jurors, [that] the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right." *Martin*, 704 F.2d at 274-75.

to your client that he has a right to try this case to a jury, have you not?

Counsel: Yes, Your Honor.

The Court: In this case, Mr. Richey, unlike some other cases there are certain aspects of the jury that would ultimately try this ease that are different than normal criminal cases. For starters, you can request what is called a special venire which basically means that through the clerk's office and ultimately through the sheriffs department, individuals 75 in number are contacted directly to come directly to this courtroom to sit as jurors in the case of the State of Ohio versus Richey.

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You have an absolute right to a trial by a jury if you choose a trial by a jury. Some time ago in conversation with your attorney, it is my understanding that he explained those rights to you -

Defendant: That's right.

(Hearing Tr. 12-14.) Thereafter, the court questioned whether it was, in fact, the defendant's signature on the jury waiver notice. Richey responded affirmatively.

It is clear from the courtroom colloquy that Richey made a voluntary and informed decision when waiving a jury trial. Although the trial court did not expressly inform Richey of the consequences of a non-unanimous jury on his sentencing, that fact alone does not alter the constitutionality of the proceeding. The Sixth Circuit does not require a

detailed explanation of the capital trial process. Neither counsel nor Richey expressed any objection to the waiver. Thus, Richey's bald assertions now that his decision was not knowing, voluntary and intelligent is unimpressive.

Furthermore, while the trial court did request that counsel notify the court of any changes in Richey's waiver decision, that request was merely to prepare for special venire notices if so required. The court did not demand a final decision, but merely expressed:

> Mr. Richey has been explained that he has a right to a trial by jury if he chooses it. He has waived that particular right. I would ask that the attorneys counsel Mr. Richey and let me know by the end of these motion hearings whether or not that is still his pleasure. If that is not his pleasure or if there is a feeling that there is going to be a problem in that area, I can cut an order ordering that a venire be sent out and that the jurors be available come January 5th.

(Hearing Tr. 15-16.) Thus, the court's request came only as a means of timely preparing for trial. Neither Richey nor his counsel subsequently attempted to revoke the jury waiver. Thus, the Court finds that Richey's rights to a jury trial were not infringed and that ground seven is not well-taken.[33]

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[33] Richey also argues that the hearing court did not comply with Ohio Rev. Code § 2945.05, which allows the withdrawal of a jury waiver at any time prior to trial. Because Richey's federal constitutional rights were kept intact during the hearing, the Court determines that it cannot hear this claim because it rests solely on state law and was not fundamentally unfair to rise to a due process violation. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

Ground 8: Richey's rights under the Sixth and Fourteenth Amendments to trial by an impartial tribunal were violated when the three-judge panel failed to recuse themselves after they considered whether Richey was a menace and ordered him to be shackled prior to trial.

Richey asserts in his eighth ground for relief that the three-judge panel was inherently prejudiced against him during trial because it previously had determined he should be shackled. Hence, he argues, the panel should have recused itself.

Initially, the Court notes that respondent argues this claim is procedurally defaulted because petitioner failed to object to the panel before trial. Petitioner asserts that the Ohio Supreme Court addressed the merits of the claim and did not clearly and expressly declare it procedurally defaulted. Although the Ohio Supreme Court was somewhat ambiguous about whether it barred this claim on procedural grounds, it appears the court conducted a plain-error analysis and alternatively addressed the claim on the merits. The court noted that, "Richey accepted the panel and raised this issue neither at trial nor before the court of appeals. Hence, we need not consider this issue." *State v. Richey*, 595 N.E.2d 915, 921 (Ohio 1992)(citations omitted). Prior to this pronunciation, however, the court fully addressed the merits of the claim.

In instances where a state court is ambiguous as to whether it is barring a claim on state procedural grounds, a habeas court should address the merits of the claim. *Harris v. Reed*, 489 U.S. 255 (1989). In *Harris*, the Court determined that the "plain statement" rule first articulated in the direct review context in *Michigan v. Long*, 463 U.S. 1032 (1983) should also be applied on habeas review.

As stated in section VI., B., 3., *supra*, however, a state court does not waive its right to exclusively decide a

claim when it issues an alternative holding. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Consequently, the Court determines that Richey has procedurally defaulted this claim. Richey summarily asserts that ineffective assistance of trial counsel can serve as "cause" to excuse the default. As the Court finds that none of petitioner's ineffective assistance of counsel claims possess merit, *see* claim twenty *infra* at 103, he has no basis on which to assert cause nor can he demonstrate prejudice. Thus, the Court need not address the merits of this claim.

If the Court were to address the merits of the claim, however, Richey asserts that because of the panel's decision to shackle him, he was denied the right to a fair trial. Additionally, Richey claims that the panel remained silent on the reasons for shackling him and did not attempt to use an alternative means to keep him subdued.[34] The Supreme Court has determined that although compelling a defendant to wear shackles during trial is "inherently prejudicial," security interests may dictate shackling but only as a last resort. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Although the Sixth Circuit has not so held, some circuit courts have required a trial court to use the least restrictive means of securing a courtroom before shackling the defendant. *See, e.g., Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995), *cert. denied*, 522 U.S. 848 (1997).

Richey's assertions must fail because they are undermined by his own actions. As the Ohio Supreme Court noted:

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[34] The Court notes that Richey, in effect, amended his Petition by asserting the above portion of claim eight in the Traverse. In the Petition, Richey asserts only that the three-judge panel should have recused itself after determining Richey's dangerousness.

> Richey told Deputy Roy Sargent on November 19 that "Randy Bassinger [the prosecutor] was a dead man" and "whoever testified against him had better hope he's six feet under." On August 17, Richey told Deputy Mike Ball to take a message to Randy Bassinger, "that when he got out he was going to cut his throat."

*State v. Richey*, 595 N.E.2d 915, 920 (Ohio 1992). It is no surprise that the three-judge panel subsequently determined, in response to die prosecutor's motion, that Richey posed a threat to courtroom security. The court determined that Richey's hands could remain free but that his feet should be shackled. Richey's threats against people who would be present in the courtroom clearly outweigh any prejudice he may have suffered.

Richey next argues that the three-judge panel should have recused itself after reviewing information that led it to conclude Richey was dangerous. By drawing this conclusion prior to trial. Richey contends, the judges became prejudiced against him. As the Ohio Supreme Court stated in its plain-error review of this claim:

> Even though the judges had been exposed to evidence about Richey's threats, they did not need to recuse themselves . . . . In this case, . . . , the trial judges are presumed not to have improperly used the evidence about threats in their subsequent deliberations. *State v. Post*, *supra*. Nothing in the record indicates they did so, and the evidence of guilt is otherwise compelling.

*Id.* at 921. Nothing in the Ohio Supreme Court's opinion is contrary to federal law. Indeed, Richey can point to no law that requires a judge to recuse his or herself after making a shackling determination. For the foregoing reasons, the Court

finds Richey's eighth ground for relief is without merit.

Ground 9: Because new scientific evidence establishes that Richey was convicted on the basis of false and unreliable scientific evidence, his conviction and sentence violate the Fourteenth Amendment.

In this claim for relief, Richey argues that the evidence proffered by Armstrong and Custer proves that Richey was convicted on the basis of false and unreliable testimony. Because he has "conclusively demonstrated" that the scientific evidence presented during trial was false, Richey maintains that the state violated his Fourteenth Amendment rights.

Respondent asserts that this claim is procedurally defaulted. It was not raised during his direct appeal but was raised, for the first time, in his post-conviction relief petition. In that proceeding, the trial court determined that this claim could have been raised on direct appeal and, thus, was barred by *res judicata.* (Respondent Ex. 73 at 5.) Richey counter-argues that, pursuant to *State v. Hamilton*, No. 3015, 1993 Lexis 6289 (Ohio Ct. App. Dec. 29. 1993), this Court should determine that Richey's scientific evidence was based on facts *de hors* the record and consequently should not bar federal habeas review.

Richey's assertion, however, is unpersuasive. First, the determination that the evidence necessary to secure a post-conviction hearing was based on evidence *de hors* the record is clearly a matter of state court determination. Moreover, the unpublished *Hamilton* opinion has questionable precedential value on the Ohio post-conviction court, much less on this Court. Because the post-conviction court determined this claim violated the *Perry* rule and the appellate and Ohio Supreme Court accepted that finding, this Court finds this ground for relief procedurally defaulted.

Were the Court to address the claim on the merits, it would fail. Richey can point to no federal law instructing a habeas court to consider a claim in which post-trial expert reports that undercut the credibility of trial experts violates his Fourteenth Amendment rights. As stated in section VI., B, 4, *supra*, Richey's experts certainly undermine the state's arson evidence but fall far short of conclusively demonstrating its falsity, as he suggests. Absent more compelling evidence that the state introduced false and unreliable evidence during trial, this claim lacks merit.

Ground 10: There was insufficient evidence to convict Richey of the crimes with which he was charged or for which he was tried, and thus Richey's conviction violated the Eighth and Fourteenth Amendments.

In his tenth ground for relief, Richey alleges that the evidence adduced during trial was insufficient to convict him. Richey proffers this allegation based on two grounds: First, Richey contends that there was insufficient evidence to support his conviction based on Richey's specific intent to kill either Cynthia Collins or Candy Barchet and Mike Nichols. Second, Richey asserts that the state presented circumstantial evidence during trial, but no direct evidence to convict him. These deficiencies, Richey argues, forced a conviction in violation of his Eighth and Fourteenth Amendment rights.

Initially, the Court notes that respondent asserts that Richey's first point is procedurally defaulted. Richey did raise an insufficiency of evidence claim to the Ohio Supreme Court, although that claim asserted only that his conviction rested on solely circumstantial evidence. Thus, that portion of his tenth claim is not procedurally defaulted. Richey did raise the transferred intent issue in an insufficiency of evidence context during his *Murnahan* proceeding. For reasons stated

above, however, that portion of claim ten is procedurally defaulted.

This claim is a re-assertion of the issue Richey raised in his Petition in his second ground for relief *supra*. The Court already has addressed the issue of transferred intent and found it to be without merit. Thus, it is unnecessary to revisit that issue.

In the second portion of his claim in which Richey complains he was convicted only on the basis of circumstantial evidence, Richey asserts that this Court should adopt a standard of review pursuant to Ohio common law. The United States Supreme Court and Sixth Circuit Court of Appeals dictate otherwise. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court determined the correct standard of review that a habeas court must employ. It concluded that the habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

In reviewing this standard, the Sixth Circuit determined in *York v. Tate*, 858 F.2d 322, 330 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989) that a habeas court must apply only the *Jackson* standard when reviewing a sufficiency of evidence claim, rather than be guided by Ohio common law. In *York*, the district court had granted a writ of habeas corpus based on Ohio common law, determining that a reasonable juror could find the defendant not guilty because the state had convicted solely on circumstantial evidence. In reversing the district court, the Sixth Circuit raised several issues. First, it noted that the *Jackson* standard was irreconcilable with Ohio common law.[35] The court went on

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[35] At the time *York* was decided, Ohio common law instructed state courts that when reviewing a case "where circumstantial evidence alone is relied upon to prove an

to note the general view that a conviction based on circumstantial evidence is a sound means by which to convict and that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 328 (quoting *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960)) (internal quotation marks omitted). The court determined that the Ohio common law rule was not required by the federal constitution. It concluded that a district court sitting in habeas review must apply the standard as set forth in *Jackson.*

In complying with this mandate, this Court must limit itself to evidence adduced during trial as a "sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence.' *Jackson* does not extend to non-record evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993)(citing *Jackson*). In viewing that evidence pursuant to the *Jackson* standard, the Court finds Richey's claim cannot withstand that review. Although only circumstantial evidence was presented at trial and that evidence was, as Richey notes, occasionally conflicting, there was more than ample evidence adduced during trial to support a conviction. The scientific evidence, presentation of a motive for the crime, testimony regarding Richey's prior threats to burn the building, and the fact that Richey was the last person to enter the apartment all could lead a reasonable juror to conclude that Richey was the perpetrator of the crime. Consequently, the Court determines that Richey's tenth ground for relief is not well-taken.[36]

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element essential to a finding of guilt, [that] it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence." *State v. Kulig.* 309 N.E.2d 897, 899 (Ohio 1974).

[36] A recent Sixth Circuit decision suggests that the *Jackson* standard was modified by 28 U.S.C. § 2254(d). *Starr v.*

Ground II: Richey was convicted on the basis of a standard of proof below that required by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

Richey argues in his eleventh ground for relief that he was convicted under a standard of proof not constitutionally permissible under *In re Winship*, 397 U.S. 358 (1970). Specifically, Richey presumes that the three-judge panel utilized the definition of reasonable doubt delineated in Ohio Revised Code § 2901.05(D). That statute provides:

> (D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a

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*Mitchell*, No. 98-4541, 2000 WL 1529807 (5th Cir. Oct. 6, 2000). In that case, the Sixth Circuit analyzed a habeas petitioner's insufficiency of evidence claim pursuant to § 2254(d)(1), holding that "a writ of habeas corpus may be issued for evidence insufficiency only if the state court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* at *3 (quoting § 2254). Because petitioner's claim cannot withstand scrutiny under the *Jackson* standard, then, *a fortiori*, the more stringent § 2254(d) standard of review cannot afford him relief.

> reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio Rev. Code § 2901.05(D).

Respondent contends that this claim is procedurally defaulted because Richey raised it for the first time during his application to re-open his direct appeal. As stated in section VI., B. 2., *supra*, Richey cannot use ineffective assistance of appellate counsel to excuse the procedural default. Thus, this Court need not address the merits of the claim.

Although Richey asserts a number of Supreme Court cases to buttress his argument, this claim must fail. The Sixth Circuit analyzed this statutory definition and upheld its constitutionality. *Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1983). More recently, the Sixth Circuit has affirmed its holding in *Thomas*. *See Byrd* v. *Collins*, 209 F.3d 486, 527 (6th Cir. 2000) *petition for cert. filed* Oct. 6, 2000. (holding trial judge's reasonable doubt instruction constitutional because it was almost the same language found in § 2901.05); *Scott v. Mitchell*, 209 F.3d 854, 884 (6th Cir. 2000)(noting district court correctly relied on *Thomas* opinion and Sixth Circuit's own affirmance of that opinion in *Byrd*). While respondent cites these cases in the Return of Writ, Richey did not address them in the Traverse, principally because he cannot evade their authority. The panel's presumed reliance on Ohio's statutory definition of reasonable doubt was constitutionally sound. Thus, the Court determines that Richey's eleventh ground for relief is without merit.

Ground 12: Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the State introduced irrelevant evidence that Richey allegedly made verbal threats against the

prosecutor and potential witnesses.

Ground 15: Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the trial court admitted an irrelevant, inflammatory, and highly prejudicial letter in the presentence investigation report.

Because both of the above claims involve admission of evidence issues, it is logical to group them together. Before addressing either claim, the Court will briefly review the scope of habeas review regarding a trial court's admissibility of evidence decision.

Alleged errors in the admission of evidence, absent some other constitutional violation, are not enough to entitle a petitioner to relief under § 2254. Review of a state court's evidentiary rulings on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewed by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F. Supp.2d 952, 985 (W.D. Ky. 1998), *rev'd on other grounds*, 230 F.3d 876 (6th' Cir. 2000)(citing *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)). *See also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988)(stating "that errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding") (citation omitted).

"To determine whether the admission of certain evidence violated the defendant's constitutional right to a fair trial, the habeas court must first determine whether the evidence is relevant or probative of an issue on which the prosecution bears the burden of proof." *Skaggs*, 27 F. Supp.

at 985 (citing *Estelle v. McGuime.* 502 U.S. 62, 69-70 (1991)). If the Court concludes that the evidence was relevant to an essential element of the state's case, its inquiry is over; by definition, there has been no due process violation. Mindful of the above restrictions to which this Court must adhere, the Court will now address petitioner's claims.

Ground 12:

In her Return of Writ, respondent asserts this claim is procedurally defaulted. Although petitioner raised this claim to the Ohio Supreme Court on direct appeal, that court reviewed this claim pursuant to a plain error analysis. *State v. Richey*, 595 N.E.2d 915, 921 (Ohio 1992) ("Although Richey moved to suppress these statements, he did not object specifically to evidence of threats. Hence, the issue is waived except for plain error."). As stated above, in section VI., B.3., *supra.* a plain error analysis, even if accompanied by an alternative review on the merits, does not constitute a state's wavier of its procedural default. Consequently, the Court finds this claim procedurally defaulted. Petitioner asserts that ineffective assistance of counsel can serve as cause to excuse the procedural default. As explained in ground for relief 20, *infra*, petitioner's ineffective assistance of counsel claims lack merit. Thus, petitioner cannot show cause and prejudice to overcome the procedural default.

Richey's claim also fails on the merits. In his twelfth ground for relief, Richey asserts that the trial court improperly admitted evidence of Richey's verbal threats against the prosecutor and witnesses who would testify against him. While in police custody, Richey told an officer that the prosecutor "was a dead man" and that "whoever testified against him had better hope he's six feet under." *State v. Richey*, 595 N.E.2d 915, 920 (1992). Additionally, Richey asked another officer that he relay a message to the prosecutor "that when he got out he was going to cut his

throat." *Id.*

In its plain error analysis, the Ohio Supreme Court cogently analyzed this claim, finding no error:

> Richey's threats reflect a consciousness of guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses. *See State v. Eaton*, (1969), 19 Ohio St.2d 145, O.O.2d 188, 249 N.E.2d 897 (flight from justice may indicate a consciousness of guilt); *Cleveland v. McNea*, (1952), 158 Ohio St. 138, 142, 48 O.O. 68, 70, 107 N.E.2d 201, 203 (suppression of adverse evidence constitutes a prejudicial circumstance of much weight).

*Id.* at 921 (further citations omitted). Richey cannot cite any Supreme Court or other federal law that would make the Ohio Supreme Court's findings unreasonable. Instead, Richey advances several fruitless arguments.

Citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), Richey asserts that the admission of the threatening evidence so infected the proceeding that it denied him the right to a fair trial. This case is inapposite, however, as *Donnelly* addresses the sole issue of prosecutorial comments during closing arguments and whether the trial court's curative instruction obliterated possible harm arising therefrom. At no point in the *Donnelly* opinion does the Supreme Court address, as is presented here, an admission of evidence issue.

Richey then attempts to bolster his claim by asserting that the admission of "other acts" evidence violated Ohio Rule of Evidence 404(b), which Ohio courts have interpreted to admit "other acts" evidence only when relevant to prove the defendant's guilt. *State v. Deivlarco*, 509 N.E.2d 1256 (Ohio 1987). Richey then asserts that Ohio Rule of Evidence 404(b) is identical to Federal Rule of Evidence 404(b) and

that, somehow, this Court should address it under the federal rule standards. As stated above, however, a habeas court's review of admission of evidence issues is limited to whether the evidence was probative or relevant to a material issue in the case. As the Ohio Supreme Court determined, the evidence of threats tends to show a consciousness of guilt. Thus, it was relevant to the state's assertion that defendant was cognitive of the crime he had committed.

Finally, Richey argues that it is unconstitutional for this Court to presume that the three-judge panel excluded improper evidence during its deliberations as this presumption only differentiates capital defendants who choose to have their case tried before a panel from those who opt for a jury trial. This presumption, however, is consistent with Sixth Circuit and Ohio state jurisprudence. *See United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir. 1972)(holding that a judge in a bench trial is presumed to consider only admissible evidence; introduction of incompetent evidence does not require reversal absent an affirmative showing of prejudice); see *also State v. Davis*, 584 N.E.2d 1192 (Ohio 1992)(holding that, in a bench trial, judges are presumed to rely upon only relevant, material, and competent evidence): *State v. Post*, 513 N.E.2d 754 (Ohio 1987)(same). Because none of Richey's attempts to demonstrate the admission of the threat evidence denied him the fundamental right to a fair trial, the court finds Richey's twelfth ground for relief not well-taken.

Ground 15:

In this ground for relief, Richey asserts that a letter Richey wrote to a boyhood friend in Scotland was highly prejudicial yet introduced during the sentencing phase of trial. In this letter Richey wrote:

If one ever pulls a gun on me he'd better shoot to kill.

> * * * Remember that day when I shot Cog's in the head [sic] with your gun, I laughed so hard I almost ripped my sides! [if the police in Scotland] ever found out about ½ the stuff we done they'd bring back the death penalty just for us! * * * If they just give me prison time they better hope to hell I die in there, cause when I get out I won't stop hunting them all down until everyone who is involved in this case is dead!

*State v. Richey*, 595 N.E.2d at 922. Petitioner explains in his briefs that the "incident" with "Gogs" (Gordon Jack) another boyhood friend involved a BB gun, in which Jack suffered no injury. Because this letter was part of the presentence investigation report, petitioner argues, he was left with the Hobson's choice of either choosing to introduce this damaging letter or limit the mitigation evidence that might be contained within the report. This potential limitation on mitigation evidence, petitioner asserts, denies his right to present any and all mitigation evidence during the penalty phase of trial as mandated by *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

Initially, the Court notes that Respondent asserts this claim is procedurally defaulted because, although raised to the Ohio Supreme Court, that court determined it was waived during trial and addressed it pursuant to a plain error analysis. For reasons stated in Richey's twelfth ground for relief the Court finds this claim is procedurally defaulted.

Moreover, even a review on the merits cannot revive this claim as it represents another of petitioner's attempts to transform a state claim into a federal one. Ohio Revised Code § 2929.03(D)(l) requires that: "When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant . . . . [c]opies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the

prosecutor, and to the offender or the offender's counsel . . . ." Ohio Rev. Code § 2929.03(D)(l). Thus, the dilemma Richey faced was part and parcel of Ohio law.

Richey cannot cloak himself in federal law to save this claim. The Supreme Court has allowed a wide scope of evidence to be admitted for a judge or jury's consideration during the sentencing phase. In *Gregg v. Georgia*, 428 U.S. 153, 204 (1976), the Court expressly rejected the defendant's contention that the scope of evidence admitted during the sentencing phase was too broad. The *Gregg* Court stated:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far reaching arguments. So long as the evidence introduced and the arguments made do not prejudice the defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

*Id.*

The Ohio Supreme Court, in its plain error analysis, also noted that the letter is arguably related to the "history, character, and background" of the defendant, which is permissible pursuant to Ohio Revised Code § 2929.04(B). *State v. Richey*, 595 N.E.2d at 922.

Mindful of the restraint a habeas court must exercise when reviewing in admissibility of evidence claim, this Court finds this claim to be without merit. First, this claim is essentially one of state law. Richey's concerns with the requirement to submit the full presentence investigation report to the court and prosecutor must be addressed by an Ohio court. Moreover, he can point to no Supreme Court precedent that supports his contention that he be entitled to

limit the information presented to the panel in his case.[37] Thus, the Court determines that Richey's fifteenth ground for relief is without merit.

Ground 13: The prosecution improperly called as a State witness a defense expert retained by Richey, in violation of the Fifth, Sixth and Fourteenth Amendments.

In his thirteenth ground for relief, Richey alleges constitutional infirmity because the state called Gregory DuBois, a defense-retained expert, as a witness in its case in chief Richey contends that his right to obtain expert assistance arising under *Ake v. Oklahoma*, 470 U.S. 68 (1985) includes the right to obtain confidential assistance. He asserts that to hold otherwise would force an indigent criminal defendant to make a choice between seeking expert assistance or risk revealing to the prosecutor a non-favorable expert report.

Initially, the Court notes that the respondent asserts this claim is procedurally defaulted. While respondent acknowledges that petitioner raised this claim on direct appeal to the Ohio Supreme Court, respondent asserts that the court addressed this claim only under a plain error analysis, thus, it is defaulted. Petitioner disputes this characterization of the Ohio Supreme Court's opinion, contending that it was

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[37] It is noteworthy that one recent Northern District of Ohio court determined that the trial court should have excluded portions of the pre-sentence investigation report. *See Esparza v. Anderson*, No. 3:96CV7434 (N. D. Ohio Oct. 13, 2000). In that case, although the district court determined the trial court committed error by permitting an unredacted copy of the report to reach the jury, it found that fact not to be of constitutional magnitude. *Id.* at 91.

unclear about the way in which the court addressed the claim. A review of the opinion suggests that the Ohio Supreme Court reviewed this claim pursuant to a plain error analysis.[38] As stated above, the Sixth Circuit has determined that a plain error review does not constitute waiver of a state finding of procedural default. Thus, this Court finds this claim to be procedurally defaulted. Richey alleges that he can overcome this default because ineffective assistance of counsel constitutes "cause" to excuse it. Specifically, he alleges that counsel's failure to object to the state's introduction of DuBois constitutes cause to excuse his default. As discussed in ground twenty, however, counsel was not ineffective for failing to object to DuBois' testimony. As Richey can assert neither cause nor does he allege prejudice to overcome the procedural default, the Court bars a merit review of this claim.

Even when addressed on the merits, Petitioner's claim lies on faulty constitutional grounds for several reasons. First, while he asserts that his Fifth, Sixth and Fourteenth Amendment rights were violated, he can point to no law supporting such a proposition. In fact, a paucity of case law exists on this issue. Jurisprudence on this issue focuses on the attorney-client privilege and whether the state violates such privilege by calling a defense expert retained but not testifying for the defense.

The Sixth Circuit has determined that the state may call a defense-retained psychiatrist who was not called at trial without violating the attorney-client privilege. *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983), *cert. denied*, 464

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[38] Upon deciding the claim on the merits the court noted: "By not objecting, Richey waived any attorney-client privilege as to Dubois. Moreover, no plain error exists; no manifest miscarriage of justice occurred because Dubois's testimony made no difference." *Stale v. Richey*, 595 N.E.2d at 922.

U.S. 1010 (1083). In that case, the court found that Ohio law permitting the prosecution to call a defense-retained psychiatrist on rebuttal did not violate the Sixth Amendment effective assistance of counsel right. Noting that the Ohio courts were attempting to strike a balance between affording a criminal defendant the full scope of the attorney-client privilege and that "[t]he ultimate objective of the trial is truth," which would be hindered by an over extension of the privilege, the Sixth Circuit held that attorney-client privilege is waived when a criminal defendant calls some, but not all defense-retained experts to testify. *Id.* at 1412.

While *Noggle* seemingly would require a determination that petitioner's attorney-client privilege was violated because petitioner did not call any experts prior to the state calling DuBois to testify, the factual distinctions between *Noggle* and the instant case render *Noggle* inapposite. On direct appeal, the Third District Court of Appeals distinguished *Noggle* from Richey's claim:

> We see a clear distinction between the testimony of an expert witness concerning statements made to him by the defendant or defense counsel and the testimony of an expert witness regarding observed facts.
>
> In the instant case, the defense-retained expert was called by the state for the sole purpose of stating his opinion as to the cause of the fire. Mr. DuBois's [sic] opinion was based entirely upon the reports of other witnesses, photographs of the scene of the fire and reports of the State Fire Marshall's Office. DuBois did not testify concerning any statements made to him by the defendant. Nor can it be said that any of his testimony was the result of communications between the defendant and his counsel. Moreover, there is no indication that Mr. DuBois ever consulted with the defendant.

*State v. Richey*, No. 12-87-2, 1989 WL 156562, at * 29 (Ohio Ct. App. Dec. 28, 1989). Although the Sixth Circuit provides no guidance regarding the distinction between the type of defense-retained expert called during trial, the Fifth Circuit has determined that expert testimony not involving privileged communications between expert and defendant do not violate attorney-client privilege and are not subject to an underlying ineffective assistance of counsel claim. *See United States v. Pipkins*, 528 F.2d 559. 563-64 (5th Cir. 1976)(holding defense-retained handwriting expert called as government witness does not violate attorney-client privilege). Thus, Richey cannot claim that DuBois' testimony violated attorney-client privilege.

Petitioner also makes much of the fact that the *Noggle* opinion noted that the expert was called during rebuttal, not during the state's case in chief, as was the case with Dubois. In *Noggle*, however, the expert was called to ascertain the mental composite of the defendant so that the defense could assert a not guilty by reason of insanity plea. In Ohio, this plea is an affirmative defense that the defendant must raise.[39] Thus, the state in that case had to call the expert only after the defendant raised the issue. In the instant case, however, the state was required to present arson evidence in its case in chief Moreover, Dubois' testimony merely served to confirm the testimony the state proffered through Cryer and Gelfius. Thus, at worst, Dubois' testimony was cumulative.

Finally, Richey relies on *Kordenbiock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1991), *cert denied.* 499 U.S. 970 (1991), for the proposition that he must not only be afforded expert assistance pursuant to *Ake*, but that expert assistance must be kept confidential. *Kordenbrock* does not dictate this outcome. In *Kordenbrock*, the Sixth Circuit determined that an

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[39] *See* Ohio Rev. Code § 2901.02(N) (setting forth burden placed on defendant to prove insanity).

independent state psychiatrist could not satisfy the *Ake* mandate. *Id.* at 1107-08. Nowhere did the *Kordenbrock* court find that experts obtained must be kept confidential. Richey's assertion that his claims even fall under the *Ake* mandate are dubious as that opinion determined only that psychiatric assistance is an integral part of an indigent criminal's effective assistance of counsel. Courts have not extended *Ake* to other experts. *See, e.g., Moore v. Johnson*, 225 F.3d 495, 502 (5th Cir. 2000)(holding petitioner not entitled to state-funded mitigation expert under *Ake); Stephens v. Kemp*, 846 F.2d 642. 645-650 (11th Cir. 1988), *cert. denied*, 488 U.S. 872 (1988), (affirming district court's decision to deny habeas relief even though trial court failed to provide petitioner with ballistics experts); *State v. Patterson*, Case No. 187732, 1986 WL 12850, at *4 (Ohio Ct. App. Nov. 13, 1986)(finding *Ake* does not require trial court to appoint pathology expert). Because Richey offers no applicable law on which to base this claim, the Court finds Richey's thirteenth ground for relief not well-taken.

Ground 14: Prosecutorial misconduct during the trial phase of Richey's trial violated his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

In his fourteenth ground for relief, Richey complains that the prosecutor's remarks during closing arguments unduly prejudiced him, thereby depriving him of a fair trial. Specifically, Richey claims that the state unfairly conjectured about how Cynthia Collins must have felt during the last hours of her life. In regards to those hours the prosecutor stated:

> I would like the Court to take a few minutes and go through with me what would have been the last eight hours of life of two-year-old Cynthia Collins. Two-

years old, it's about ten days before her birthday. She would have been three. Upon the board here I put a picture of Cynthia Collins as she appeared that year.

She was playing around the apartment that night. Hope is partying, everybody else is partying. Hope comes and goes, doesn't seem really too concerned, in my opinion, about whether she takes care of Cynthia or not. Other people are left in charge.

Picture in your mind the point of view from Cynthia. Picture, if you can, what her last eight hours were. She is outside playing, all these people are around partying, playing with some friends of hers.

Her mom is not there: her mom is out somewhere else.

And at some point, somebody else puts Cynthia to bed, not her mom, not her dad, somebody puts her to bed.

She goes to bed in the back bedroom and she is sleeping for awhile until she hears some partying going on. She gets up and walks out. And what does she see? She sees Hope Collins and Doug Mull and Bob Nienberg out there smoking hash. She, of course, doesn't really realize what is going on.

She crawls up on somebody's lap and goes over to her

mom and the Defendant is there at some point smoking hash,

too. And she is put back to bed.

The next thing that happened with Cynthia Collins is a fire. If I can use the metaphor, if there is ever a hell in this earth it would be what Cynthia Collins faced at the end of her life: A fire, a raging inferno started by this man knowing that Cynthia was in the back bedroom, knowing she was back there sleeping, having been left in charge, left to babysit by Hope Collins.

Cynthia wakes up in this room that I have aft ached here to the diagram. She wakes up in a smoke-filled room, a room that Keith Hartoon, if you can remember, described as smoked so heavy that when it first came out he said to himself, "I won't go in there, I can't survive."

Cynthia got out of this bed right here. And with the smoke of the raging inferno from the living room probably tried to get out of the room.

Defense Counsel: Objection

The Court: Overruled.

Prosecutor: But the smoke and the heat and the fire and the confusion caused her to die at that point. Think in your mind, if you will, those last few moments of Cynthia Collins' life, getting up, calling for someone perhaps, calling for her mother, calling for her father, calling for anyone, being alone in an apartment with a raging fire caused by this psychopathic killer.

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At that point, Cynthia Collins is down on the carpet face down, dead in her bedroom alone.

(Trial Tr. 1017-1020.) Petitioner also objected to the prosecutor's remarks that petitioner was a "psychopath" both in the above passage and interspersed throughout the closing remarks.

The respondent concedes that this claim was raised

and addressed on the merits to the Ohio Supreme Court on direct appeal as Proposition of Law V. *State v. Richey*, 595 N.E.2d at 924. Accordingly, the Court will address this claim on the merits.

To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168. 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U. S. 637, 642 (1974)). This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989)(Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

Recently, the Sixth Circuit reaffirmed its prior jurisprudence on prosecutorial misconduct. *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000). The court determined that a district court should first determine whether the challenged statements were, in fact, improper, and if so, to determine whether the comments were "flagrant," thus requiring reversal. *Id.* at 717.

> Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of evidence against the accused.

*Id.* (internal quotation marks and citation omitted).

Although petitioner attempts to liken the prosecutor's closing remarks in his case with that of the *Boyle* petitioner, that analogy must fail. In *Boyle*, the Sixth Circuit determined that prosecutorial misconduct, particularly during closing arguments, was sufficiently prejudicial to grant a writ of habeas corpus. There, the prosecutor, among other things, made several references to the defendant's "privileged" social and economic status as somehow affording the defendant special treatment in the case and other statements that did not originate from the evidence presented during trial. In the instant case, however, the prosecutors remarks, although perhaps excessive in speculation, were not so egregious that they could be classified as "flagrant." The rendition of Cynthia's final moments was fairly brief when taken in context of the entire summation, let alone the evidence presented at trial. The classification of petitioner's mental condition can be likewise categorized as brief and sporadic, rather than excessive. Moreover, given the evidence presented during trial, the statements were not outrageous.

As the Ohio Supreme Court stated:

> The prosecutor did not commit crucial errors. The prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence. In any event, it was not prejudicial before a panel of judges. *State v. Post, supra.*
>
> ***
>
> The prosecutor's reference to the helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial. *See Payne v. Tennessee*, (1991) 501 U.S. 808 . . . . Thus. Proposition of Law V is overruled.

*State v. Richey*, 595 N.E.2d at 924.

Because the Ohio Supreme Court's review of the facts and applicable law on this issue was not an unreasonable application of federal law, the Court determines that this ground for relief lacks merit.

Ground 16: The three-judge panel's unsupported decision at sentencing completely to ignore Richey's compelling mitigating evidence deprived Richey of rights guaranteed under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

Ground 18: The three-judge panel's failure to consider all mitigating factors during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

Because of the similarity presented in grounds sixteen and eighteen, the Court will consider them simultaneously. In these grounds for relief, Richey alleges the panel on several occasions improperly determined the presence or absence of mitigation. First, Richey contends that the trial court determined, without support from evidence adduced during trial, that Richey had pulled the smoke detector near the Collins apartment from the ceiling, diminishing Cynthia Collins' opportunity to escape the fire unharmed. Respondent does not refute this allegation in the Return of Writ. Additionally, Richey asserts that the three-judge panel ignored a litany of mitigating evidence proffered during the penalty phase. Specifically, Richey maintains the following mitigation evidence was not given due weight during trial:

1) evidence that Richey attempted to return to the Collins apartment in efforts to save Cynthia

2) evidence that Richey suffers from a personality disorder

3) unrefuted evidence that Richey never intended to kill Cynthia

4) it was essentially impossible to kill Candy Barchet and/or Mike Nichols by setting fire in the apartment above Barchet's

5) no accelerants were found on the clothing Richey wore on the night in question

6) the physical evidence upon which traces of accelerants were found was tainted

7) there was no evidence that Richey had actual knowledge that Barchet and/or Nichols were in the downstairs apartment at the time that he allegedly set the fire

8) Richey was intoxicated at the time of the fire

Petition at 43, 45.

Respondent urges the Court to note that portions of this claim are procedurally defaulted and. therefore, should not be addressed on the merits. Respondent submits that while Richey raised most of the above issues on direct appeal as Proposition of Law XVII, he did not raise the issue of his attempts to save Cynthia Collins as a mitigating factor until the *Murnahan* proceeding. This Court agrees. Consequently, as stated in section VI., B., 2., *supra*, the Court finds that portion of Richey's claim to be procedurally defaulted.

In addressing the merits of the claim, Richey relies heavily in his Petition on *Eddings v. Oklahoma*, 455 U.S. 104 (1982) to support the assertion that the trial court

unconstitutionally excluded certain mitigating evidence. As respondent notes, however, the *Eddings* holding merely instructs that the sentencer cannot "refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 114. In that case, the Court inferred by the trial court's language that it had excluded certain evidence regarding the defendant's background because it was legally obligated to do so. In determining the trial court's discarding of mitigating evidence on legal grounds, the Court noted that the evidence the defendant proffered could, "[i]n some cases . . . be given little weight." *Id.* at 115. Thus, the Court did not instruct courts as to how they may appraise the mitigating evidence a defendant proffers, but instead required courts not to exclude evidence because it believed exclusion legally necessary.

Richey's claim that the trial court unconstitutionally excluded mitigating evidence must fail. The panel listed all evidence Richey presented during trial in its Opinion of the Trial Judge in Capital Case. (Respondent Ex. 46.) Although the court stated that it considered all the evidence presented in mitigation, it focused on two statutory mitigating factors: Whether Richey was suffering from a mental disease or defect at the time he committed the offense (Ohio Rev. Code § 2929.04(B)(3) or whether there were any other factors relevant to mitigation (Ohio Rev. Code § 292904.(B)(7).[40] The court determined that there was little evidence to support Richey's claims of mental defect. The court then listed all evidence that Richey presented under the "catch-all"

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[40] Richey also presented evidence of his youth at the time the crime was committed pursuant to Ohio Revised Code § 2929.04(B)(4). He was twenty-one at the time he committed the crimes.

statutory mitigating factor, finding it insufficient to establish that factor. (Respondent Ex. 46 at 2-3.)

Based on the trial court opinion, Richey's claim must fail. Unlike the *Eddings* trial court, the trial court here considered all evidence Richey proffered during mitigation yet determined it deserved little weight. The Court cannot overturn that court's decision absent constitutional infirmity. As stated above, the Sixth Circuit has stated, "'[i]n a federal habeas corpus proceeding such as this one, we do not sit as a "'super' state supreme court" to judge whether the judge erred under state law. Rather, our task is to determine whether the violation rises to the level of a constitutional wrong." *Wilson v. McMacken*, 786 F.2d 216, 221 (6th Cir. 1986). *See also Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)(holding habeas court must defer to state's own interpretation of state law); *Duff v. Folzz*, 804 F.2d 50, 54 (6th Cir. 1986)(same). Because the trial court's assignment of how much weight it was to give to each mitigating factor is a matter of application of the facts presented to the statutory mitigating factors, this Court cannot now re-weigh those factors to find an outcome according to its liking. This Court is constrained to correct only infractions of constitutional magnitude.

Richey further argues, however, that the trial court erred when it found that Richey intentionally pulled the fire alarm from the ceiling although the state did not introduce evidence that Richey had done so. The respondent does not address this allegation in the Return of Writ. In its sentencing opinion, the trial court listed all evidence presented under the "catch-all" mitigation provision, then, when listing the last provision wrote:

> f) and finally, evidence that the defendant attempted to re-enter the victim's apartment after the fire commenced to rescue the decedent.

> ------this final contention of the defendant was immediately disposed of when placed in juxtaposition to the unrefuted evidence that the defendant pulled the fire alarm from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise.

(Respondent Ex. 46 at 2.) Petitioner alleges that the court's last statement not only served to discount mitigating evidence of his attempts to save Cynthia Collins' life, but the court improperly used the unfounded smoke alarm determination improperly, creating a non-statutory aggravating circumstance.

To the extent that the trial court improperly considered this or any other evidence, any error may be cured by the appellate court's re-weighing of the aggravating circumstances and mitigating factors. In *Clemmons v. Mississippi*, 494 U.S. 738 (1990), the Supreme Court determined that an appellate court's re-weighing of improper aggravating factors can have a curative effect. In that case, the jury found that the state established two statutory aggravating circumstances and sentenced the petitioner to death. *Id.* at 742. The Mississippi Supreme Court later invalidated one of the aggravating circumstances as unconstitutionally vague but upheld the death sentence because the appellate court re-weighed the sentencing decision without the invalidated aggravating factor and found it appropriate. *Id.* at 743. The Supreme Court held that a death sentence could be upheld on appeal even when the jury had considered an invalid or improperly defined aggravating factor. The court determined:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one or two or more aggravating

> circumstances found by the jury, but affirms the death sentence after itself finding that one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

*Id.* at 745 (citations omitted). The Court remanded the case, however, because is was unclear from the record whether the Mississippi Supreme Court performed the weighing function after it excluded the invalidated aggravating circumstance. *Id.* at 751.

The Court revisited the issue of vague aggravating circumstances in *Stringer v. Black.* 503 U.S. 222 (1992). In *Stringer*, the Court further clarified the state appellate re-weighing process necessary to uphold a death sentence resulting from a constitutionally impermissible aggravating circumstance. First, the Court divided states into "weighing" states or "finding" states. In the first category, a state's capital sentencing process requires the jury to find at least one aggravating circumstance, then weigh that evidence against any mitigating circumstances. *id.* at 229. In "finding" states, however, a jury must find the existence of one aggravating circumstance before considering the death penalty but the aggravating circumstances do not have a specific function in the jury's decision to impose the death penalty. *Id.*

The Court determined appellate review in a "weighing" state would require closer scrutiny than a "finding" state. In those states, the Court opined, for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." *Id.* at 230. Moreover, the Court cautioned appellate

courts to subject a death sentence to even closer scrutiny when the trial court utilized a vague or imprecise factor. In those instances, a reviewing court must, ". . . at the very least [conduct a] constitutional harmless-error analysis or re-weighing in the state judicial system." *Id.* at 237.

Because the degree of a reviewing court's scrutiny depends heavily upon the type of state in which a petitioner was convicted, the Court first must determine whether Ohio is a "weighing" state or a "finding" state. A brief review of the Ohio Revised Code reveals it is the former. The Revised Code provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt . . . the court, trial jury, or panel of three judges **shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors**

Ohio Rev. Code § 2929.04(B)(emphasis supplied).

After concluding that Ohio is a weighing state, the Court must next ascertain whether the Ohio Supreme Court sufficiently re-weighed the aggravating circumstances on review. The Court determines that it did. In its re-weighing the Ohio Supreme Court determined:

> Richey's background and his personality disorders are relevant under R.C. 2929.04(B)(7), but their impact has already been considered as part of his background and history. No other mitigation appears relevant as "other factors" under R.C. 2929.04(B)(7).
>
> Despite this mitigation evidence, the

> aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.

*State v. Richey* 595 N.E.2d at 931. Of his attempts to rescue Cynthia Collins from the fire, the court stated: "His ostensible efforts to save Cynthia did not help her and interfered with firemen's efforts to rescue her and fight the fire. Under the circumstances, nothing in the facts of the offense is mitigating." *Id.* Because the Ohio Supreme Court's re-weighing process was not an unreasonable application of federal law, this Court finds Richey's sixteenth and eighteenth grounds for relief are not well-taken.

Out of an abundance of caution, the Court will, nevertheless, subject the trial court's finding that Richey unhinged the smoke alarm to a harmless error analysis. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))(internal quotation marks omitted); *McGhee v. Yukins*, 229 F.3d 506, 513 (6th Cir. 2000). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

In this case, any error the trial court admitted by

determining that Richey was responsible for disconnecting the smoke alarm is harmless beyond a reasonable doubt. While Richey may not have been responsible for the smoke alarm's failure, evidence adduced during trial demonstrated that he was aware that Cynthia was sleeping in a back bedroom when he started the fire. Thus, whether he actually disconnected the smoke alarm is of little consequence and would not have swayed the trial court's opinion in finding that Richey had not sufficiently established the "catch-all" mitigating factor.

Additionally, the Court takes issue with Richey's assertion that the trial court, in effect, used the smoke alarm evidence as an impermissible aggravating circumstance. By "juxtaposing" its finding that Richey unhinged the smoke detector with his efforts to rescue Cynthia, the court was merely determining that Richey did not sufficiently establish that his rescue attempts could be categorized as mitigating evidence. Consequently, any error in finding that Richey disconnected the smoke detector was harmless error.

Finally, the court finds that the Ohio Supreme Court's opinion in addressing portions of this claim are not unreasonable applications of federal law pursuant to 2254(d)(1). That court held:.

> In Proposition of Law XVII, Richey complains the trial court erred in not giving any weight to relevant mitigation evidence. In Proposition of Law XIX, Richey argues the court of appeals failed to individually consider his particular character and family background.
>
> Richey presented a variety of evidence concerning his personal history, character and background. Also, several mental health professionals concluded that Richey suffered from borderline and antisocial personality disorders. Richey reasons that this evidence was strongly mitigating and that the

trial court and court of appeals erred by imposing a death sentence.

Contrary to Richey's claims, courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents. *See Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 1; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. What weight to be given mitigation evidence is necessarily an individual decision by the fact finder. " * * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen*, *supra*, paragraph two of the syllabus. *See*, *also*, *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598. paragraph two of the syllabus.

At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight. *See State v. Cooey*, *supra*, 46 Ohio St.3d at 41. 544 N.E.2d at 919; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883. 889-890.

*State v. Richey*, 595 N.E.2d at 929. Because the Ohio Supreme Court's analysis is not contrary to applicable federal law, the Court determines this claim is without merit.

Ground 17: Because the three-judge panel improperly required that Richey's mitigating factors "justify" rather than simply "mitigate," Richey's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments were violated.

In his seventeenth ground for relief, Richey contends that the three-judge panel unconstitutionally shifted the burden of proof for establishing a mitigating factor when it stated in its sentencing opinion that Richey had to justify his actions for the panel to consider that evidence in relation to the aggravating factor.

In the Imposition of Sentence section of its opinion the panel stated:

> The court, after consideration of the evidence raised at the original trial, the testimony, other evidence, and the arguments of counsel found that the defendant produced no evidence that rose to the level of a mitigating factor. The court finds beyond a reasonable doubt that even if the evidence at the sentencing trial rose to the level of mitigating factors, the aggravating circumstance the defendant was found guilty of outweigh the evidence in mitigation opposed to it.
>
> The panel, therefore, unanimously voted for the imposition of death. Unhappily, the defendant's criminal actions are within what this court feels is recognizable human behavior. The defendant's acts resulting in the death of Cynthia Collins were cold, senseless and savage, **lacking in even a hint of justification**.
>
> The court, therefore, finds beyond a reasonable doubt that the aggravating circumstances outweigh the 'mitigating factors.'

(Respondent ex. 46 at 3)(emphasis supplied). Richey contends that the emboldened language proves the panel required him to produce evidence to justify his crime, rather than merely accept evidence in mitigation of it. Moreover, Richey complains that the Ohio Supreme Court required mitigating evidence to rise to a level of "legal excuse" before

it would find that the evidence constituted a mitigating factor.

Initially, the Court notes that respondent asserts this claim is procedurally defaulted. Richey never raised this claim on direct appeal or at trial. It was raised for the first time during his *Murnahan* application. Richey alleges ineffective assistance of appellate counsel should serve as cause to excuse the default. As he cannot prove that counsel was ineffective, the Court finds this claim to be procedurally defaulted.

In its review on the merits, the Court disputes both the factual and legal allegations in this claim. First, other than Richey's bald assertion and concentration on the word "justification" at the close of the opinion, there simply is no indication that the panel improperly shifted the burden of proof during mitigation. In fact, prior to the section imposing sentence, the court listed all facts that it had accepted into evidence. Thus, although Richey relies heavily on *Eddings v. Oklahoma*, *supra*, that case is easily distinguishable because there, the Court determined the trial court had impermissibly excluded evidence from its consideration. Moreover, when taken in context of the entire section, it is clear that the panel weighed the evidence proffered but found it of insufficient weight to constitute a mitigating factor. Thus, it does not appear the panel assigned a heightened burden of proof to establish any mitigating factors.

Similarly, Richey's contention that the Ohio Supreme Court improperly re-weighed the aggravating and mitigating factors is unfounded. Richey concludes that because the Ohio Supreme Court determined that the mental health evidence adduced during the sentencing phase "did not rise to the level of substantial impairment of capacity," 595 N.E.2d at 930, that the court defined mitigation to include only evidence sufficient to demonstrate legal excuse. Once again, however, Richey misinterprets the court's findings. Rather than saying it would not consider evidence in mitigation unless it rose to a level of legal excuse, the Ohio Supreme Court was merely

articulating that after it considered all evidence adduced in mitigation, it assigned that evidence little weight, insufficient to establish a factor in mitigation. That reweighing of the evidence is precisely the task the Ohio Supreme Court must undertake to cure any trial court weighing defect. *Clemmons v. Mississippi*, 494 U.S. 738 (1990).

Conversely, as Richey himself notes, this Court cannot perform such a review. *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999). The only remedy this Court may apply on habeas review to determine the validity of the sentence is to perform a harmless error analysis. *Id.* Although this Court need not perform such an analysis as this claim can be dismissed based on its factual inaccuracy, out of an abundance of caution, it will be undertaken. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))(internal quotation marks omitted); *McGhee* v. *Yukins*, 229 F.3d 506. 513 (6th Cir. 2000). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

In the instant case, it is clear that any misstatement regarding the "justification" of Richey's acts do not implicate an improper influence on the panel's sentencing determination. When viewed *en total*, it is clear that the trial court considered all evidence in mitigation yet found that it held insufficient weight to give rise to a mitigating factor. Without further evidence than a single use of the word after it made its weighing determination, there is inadequate proof to make a determination that the trial panel used an improper burden of proof to establish a mitigating factor, unduly influencing the sentence thereby. Consequently, this Court

finds that the use of the word "justification," albeit potentially improper, was harmless error. Therefore, Richey's seventeenth ground for relief lacks merit.

> Ground 19: The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

In this ground for relief, Richey argues that because the panel failed to consider "residual doubt" during the penalty phase, it somehow violated the Constitution, enabling this Court to grant him relief. In his Petition, Richey lists specific factors that the trial court could have, but apparently did not consider in the penalty phase of trial.[41]

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[41] Richey alleges the following factors comprise "residual doubt":

> 1. From 6:27 a.m. on the day of the fire when the police first questioned him through today, Richey has steadfastly and unflinchingly maintained his innocence.
>
> 2. There is insufficient evidence that Richey specifically intended to cause anyone's death.
>
> 3. No accelerants were found on the clothing Richey wore on the night in question.
>
> 4. The physical evidence upon which traces of accelerants were found was tainted.
>
> 5. It was essentially impossible to kill Candy

Barchet and/or Mike Nichols by setting fire in the apartment above Barchet's.

6. If Richey had actually intended to kill Barchet, there was a far simpler way of doing it – after all, her window was wide open at the time of the fire.

7. There was no evidence that Richey had actual knowledge that Barchet and/or Nichols were in the downstairs apartment at the time that he allegedly set the fire.

8. There was unrefuted evidence that Richey never intended to kill Cynthia Collins.

9. Richey attempted to save the life of Cynthia Collins.

10. Richey's alibi explanation as to where he was and what he was doing between 3:40 a.m. and 4:15 a.m. on June 30, 1986 was inherently plausible.

11. There were dramatic inconsistencies and contradictions in the evidence concerning Richey's alleged statement that he was going to burn "A Building" during the evening of June 29/30, 1986.

12. Each of the witnesses who heard Richey say something about burning "A Building" had been drinking heavily prior to the time when they allegedly heard Richey's statement.

13. Juanita Altimus, one of the State's principal witnesses against Richey, was a patently unreliable witness whose testimony was not credible.

Respondent asserts this claim is procedurally defaulted because Richey failed to raise it on direct appeal. Richey acknowledges that he did not raise this claim until he filed his *Murnahan* petition. As stated above, Richey cannot assert ineffective assistance of counsel as cause to excuse procedural default. Thus, this claim is procedurally defaulted.

A merit review of this claim proves unsuccessful as well. To grant a writ of habeas corpus, a petitioner must allege some state court error that offends the federal constitution or laws. 28 U.S.C. § 2241; *Pulley v. Harris*, 465 U.S. 37, 41(1984). Richey, however, asserts no such claim here. Although the Supreme Court has noted that, in a single jury system, doubts about the defendant's guilt created during the guilt phase of the trial may benefit him or her during the penalty phase, the Court placed no constitutional emphasis on these observations. See *Lockhart v. McCrea*, 476 U.S. 162, 181 (1986)(determining that defendant could benefit from residual doubt in a one-jury state criminal system). Petitioner's urging that there was "substantial precedent" at the time of Richey's trial for the panel to consider residual doubt is beside the point. Unless he can assert some federal violation in the panel's exclusion of residual doubt as a mitigating factor, this Court cannot offer him relief. Hence, this Court finds Richey's nineteenth ground for relief is not well-taken.

Ground 20: Richey received ineffective assistance of

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14. There were substantial inconsistencies between the testimony of State Fire Marshall Robert Cryer and Sherry Tice regarding Cryer's initial opinion concerning the cause of the fire.

15. Richey was intoxicated at the time of the fire.

counsel during the guilt phase of his capital trial in violation of the Sixth and Fourteenth Amendments.

In this ground for relief, Riehey alleges twelve principal instances in which trial counsel's errors during the guilt phase of trial were so egregious as to be constitutionally defective.[42] Because respondent alleges procedural default

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[42] In his Petition, Richey alleges that the following actions or inactions by counsel should afford him relief:

1) The actions of an incompetent defense expert prevented counsel from rendering meaningful assistance.
2) Defense counsel failed to conduct an adequate background search for a competent expert, permitting false scientific testimony to go unchallenged during trial.
3) Defense counsel failed to call an expert witness to rebut the testimony of Cryer, Gelfius and DuBois.
4) Counsel failed to object to the introduction of irrelevant and highly prejudicial testimony.
5) Counsel failed to object to the state calling DuBois to testify on its behalf during trial.
6) Counsel disclosed DuBois' name on the witness list he provided the state prior to trial.
7) Counsel failed to object to evidence that petitioner had fought with John Butler prior to June 30, 1986.
8) Counsel failed to object to multiple instances in which the state introduced inadmissable, speculative witness testimony.
9) Counsel failed to make numerous motions.
10) Counsel failed to introduce evidence of the prosecutor's attempt to plea bargain with petitioner before trial.

as to only a portion of these claims, the procedural default analysis will be addressed for each sub-claim individually along with the merits of the claim.

As stated in section VI., B. 2, *supra*, the Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v. Cronic*, 466

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11) Counsel failed to introduce evidence of Peggy Villarreal disclosing Cynthia Collins' prior play with fire and Hope Collins disconnecting the smoke detector in her apartment on the evening of the fire.

12) Counsel failed to insure that he presentence investigation report was accurate and reliable.

Petition at 48-60.

U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*. 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently re-weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696. To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different trial strategy might have been more successful, but a court must "focus[]on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Mindful of the above requirements, the Court will now address each sub-claim.

A. Defaulted Sub-Claims

Of the twelve sub-claims asserting ineffective assistance of counsel, respondent asserts that ten are procedurally defaulted. Petitioner raised some of these claims for the first time during his petition for post-conviction relief. Petitioner correctly alleges in his Traverse that these claims are not defaulted because they involve facts *dehors* the record. Indeed, in *State v. Coleman*, 707 N.E.2d 476, 483 (Ohio 1999), *cert. denied*, – U.S.–, 120 S.Ct. 379 (1999), the Ohio Supreme Court determined that evidence developed

outside of, or *dehors*, the record cannot be raised initially on direct appeal. Consequently, although respondent asserts sub-claims one, two, three, ten, eleven, and twelve are procedurally defaulted because Richey failed to raise them on direct appeal, the Court determines that because these claims are based on evidence *dehors* the record, they are not defaulted. Those claims will be addressed in section B below. Alternatively, claims six, seven, eight, and nine are procedurally defaulted because they were raised for the first time during the *Murnahan* proceeding although they involved facts based on the record alone.

In sub-claim six, Richey alleges that trial counsel erred when he placed Gregory DuBois' name on the witness list. Although Richey initially implies in his Petition that trial counsel knew DuBois would provide testimony harmful to the defense, he later acknowledges that counsel was unaware of the content of the DuBois report when placing him on the witness list. During his deposition in preparation for this matter, William F. Kluge, lead counsel for Richey during trial, explains that his strategy for placing DuBois' name on the witness list was in response to the state's motion for discovery pursuant to Ohio Rule of Criminal Procedure 16(E)(3). That rule requires defense counsel to list all potential witnesses to be called during trial. As Kluge stated during his recent deposition:

Respondent: Would you explain why you felt you had a duty to provide the State with notice of the witnesses names and addresses in this case?

Counsel: Well, Rule 16 requires us to do so upon request of the State. So we had a list of witnesses which we indicated might be used at trial. And Mr. DuBois, who is on this exhibit was a witness that we intended to call at trial. I don't think we had his report yet at that time

. . . But I'm not real sure.

Respondent: Were you at all worried that if you withheld Mr. DuBois' name and you decided to call him at trial and if you had not given the State notice of his name, that he would not be permitted to testify?

Counsel: Oh, absolutely.

Respondent: So that would have been your reason for, even though you didn't have a report at that time, to at least give notice to preserve your right to call him at trial?

Counsel: Yes.

(Kluge Dep. at 16-17.) Thus, Kluge's decision to list DuBois as a potential witness for trial was a tactical one. Moreover, as respondent notes, Kluge's decision to list DuBois placed him in a risk adverse situation; either DuBois would contradict the state's arson findings, or, at worst, DuBois' testimony would merely be cumulative of the testimony the state already had presented. Counsel's decision to place DuBois on the witness list represents the type of decision *Strickland* meant to shield from constitutional attack. Thus, the Court finds sub-claim six is without merit.

In sub-claim seven, Richey asserts that defense counsel was ineffective for failing to object to the introduction of testimony regarding Richey's reaction to John Butler, a man with whom Candy Barchet had sexual relations during the time she was also seeing petitioner. During trial, the state introduced evidence that when Richey discovered that Barchet and Butler had had relations, he engaged in an altercation with Butler. Richey asserts this is propensity evidence inadmissible under Ohio Rule of Evidence 404(A).

Respondent counters, however, that this evidence helped the state prove a motive for igniting the fire – that Richey became irrationally jealous when discovering Barchet was involved with other men. Because this evidence tended to prove a motive for setting the fire, respondent contends, it falls under the purview of Ohio Rule of Evidence 404(B). The Court determines that counsel's conduct in not objecting to this evidence was not objectively unreasonable as it did, in fact, aid the state in establishing a motive for Richey's arson. Thus, the Court finds this sub-claim not well-taken.

In his eighth sub-claim, Richey asserts that counsel was ineffective for failing to object to various witnesses' testimony regarding their impression of why Richey was upset on the night of the fire. Richey cannot claim that counsel was deficient in failing to object to properly admitted evidence. During the testimony of Robert Dannenberger and Peggy Villarreal, the state elicited testimony as to their observations of why Richey was upset on the evening in question. This evidence was relevant as to Richey's motive to commit the crime and relevant under Ohio Rule of Evidence 401. Thus, counsel was not unreasonable for failing to object to it. Consequently, this sub-claim is without merit.

Finally, in his ninth sub-claim. Richey alleges counsel's ineffectiveness for failing to file a number of trial motions. These motions are:

a. failing to file a motion to dismiss or judgment of acquittal on Count I of the indictment on the ground that transferred intent does not apply to aggravated murder.

b. failure to file a motion to dismiss or judgment of acquittal because the state constructively amended the indictment.

c. failure to file a motion to dismiss or judgment of

acquittal because the three judge panel found that Richey intended to kill Cynthia Collins.

d. failure to file a motion for a new trial after Richey was convicted of specifically intending to kill Cynthia Collins.

e. failure to file a judgment of acquittal for specifically intending to kill Barchet and Nichols.

Because "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," *Strickland*, 466 U.S. at 697, it is possible to disregard claims based on the fact that they did not prejudice the petitioner. Because all of the above motions were asserted as separate claims elsewhere in this Opinion and found to be without merit (*see* grounds for relief three, four, five, and ten), the Court presumes that counsel's failure to file motions in conjunction with these claims is not prejudicial as it does not undermine the confidence in the outcome of the proceeding. Thus, sub-claim nine is without merit.

B. Non-defaulted Sub-claims

The Court combines sub-claims one, two, and three as all address counsel's decision to hire DuBois and scrutinize his report. As stated above, while respondent asserts these claims are procedurally defaulted, they are based on evidence outside the record and, thus, were properly raised for the first time during post-conviction proceedings. Thus, the Court can address these claims on the merits. Richey asserts that counsel was ineffective for hiring DuBois, for accepting without further question DuBois' results, and for failing to obtain new experts whose reports would have mirrored those of Custer and Armstrong.

Richey relies on *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) for the proposition that failure to conduct an adequate trial investigation constitutes constitutional ineffectiveness. *Combs*, however, is inapposite to the instant case. In *Combs*, defense counsel, alleging an intoxication defense, called an expert witness to testify regarding defendant's psychological ability to form the intent to commit murder. *Id.* at 288. On cross-examination, however, the state asked the expert whether the defendant was so intoxicated on the night of the crime that he could not have formed the intent to commit the crime. The expert responded that was not the ease. Although defense counsel attempted to rehabilitate the expert on re-direct examination, the Sixth Circuit concluded that "this testimony was completely devastating to the defense, and counsel's decision to present it was objectively unreasonable." *Id.*

Conversely, in this case counsel decided not to call DuBois to testify after discussing the content of the report with him. Instead, after learning the contents of DuBois' report, counsel amended his trial strategy to one of questioning whether Richey was, in fact, the arsonist as he had an alibi and the lack of accelerant found on his clothing. Thus, Richey's counsel's behavior was far different than the circumstances presented in *Combs*.

Moreover, counsel's decision to hire DuBois and failure to conduct a search for a new investigator upon receiving DuBois' report does not constitute ineffectiveness. Courts have never instructed that "counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Sidebottom v. Delo*, 31 F.3d 744, 753 (6th Cir. 1995)(internal quotation marks and citation omitted). It is not incumbent upon counsel after seeking and employing an expert to determine the validity of state evidence to then continue expert-shopping until such a time that counsel can produce a favorable expert. While courts have steadfastly held that the failure to *investigate* can

constitute ineffective assistance of counsel, *see Williams (Terry) v.. Taylor*, – U.S.–, 120 S. Ct. 1495, 1514 (2000)(failure to investigate numerous evidence in mitigation and present it during penalty phase constitutes ineffective assistance of counsel); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995), *cert. denied*, 519 U.S. 910 (1996)(same), no court has determined that once counsel undertakes an adequate investigation, any disfavorable results constitutionally require further investigation. Thus, is was not unreasonable for counsel to hire an expert from a known firm who conducted arson investigations or decline from further expert-shopping once that expert rendered his opinion.

Finally, petitioner makes much of the fact that counsel failed to question DuBois' results and, in particular, whether DuBois had done independent research in drawing his conclusions. The Court determines, however, that it is not unreasonable for counsel to rely on expert opinion without questioning the origin of the results. After all, counsel's purpose in hiring an expert is specifically so that he need not make the kind of forensic decisions for which he has hired the expert initially. If counsel were in a position to determine that independent testing of the carpet and wood deck samples was necessary, a fact that DuBois disputes, counsel would likely be in a position to render his own expert testimony. Again, counsel cannot be charged with unreasonable conduct for simply relying on one who holds a degree in a specified area of science, working for a reputable company. To do so would require counsel to go beyond "effective" assistance of counsel to instead render all-inclusive trial assistance; a job for which a law degree does not prepare him. Because counsel's conduct in hiring DuBois and accepting his report was not objectively unreasonable, the Court finds sub-claims one, two and three are not well-taken.

In sub-claim four, Richey contends that his counsel was ineffective for failing to object to evidence that Richey

was a dangerous person and failing to motion the panel to recuse itself after making the finding that Richey's potential danger required him to be shackled. These claims were addressed, *supra* at 69, 72 as grounds for relief eight and nine. Because the Court finds that grounds eight and nine are not meritorious, the Court consequently finds that counsel was not acting unreasonably, nor was Richey prejudiced by counsel's failure to move the panel to recuse itself and the introduction of Richey's potential dangerousness. Furthermore, the Ohio Supreme Court's decision is not contrary to federal law. That court stated: "Richey complains first that his counsel failed to object to evidence about his threats to the prosecutor and witnesses. However, this evidence was arguably admissible and, in any event, made no difference at trial." 595 N.E.2d at 927. As this factual finding in not an unreasonable application of fact, the Court finds this sub-claim lacks merit.

Similarly, in sub-claim five, Richey alleges counsel's constitutional ineffectiveness for failing to object to the prosecution calling DuBois during its case in chief. As the underlying claim was addressed and found to be without merit in ground for relief 13, *supra*, this Court determines that this sub-claim is without merit.

In his tenth sub-claim, Richey alleges counsel's ineffectiveness for failure to introduce evidence that the prosecution offered Richey a plea bargain prior to trial. Richey contends that this evidence, at the very least, should have been raised during the penalty phase of trial to persuade the panel that the death penalty was inappropriate in this ease. As the post-conviction court noted, however, plea offers are considered inadmissible evidence under Ohio Rule of Evidence 410. (Respondent Ex. 73 at 13.) Thus, counsel was not unreasonable for failing to introduce evidence that, pursuant to Ohio evidence law, was inadmissible. Consequently, the Court determines that this sub-claim is without merit.

In Richey's eleventh sub-claim, he argues that counsel was ineffective for failing to utilize the testimony of Peggy Villarreal (a.k.a. Mary Margaret Pingle Villarreal). In testimony provided in an affidavit and in depositions in preparation for this proceeding, Villarreal averred that Cynthia Collins had, on several occasions, been disciplined for playing with matches and starting a fire. Additionally, Villarreal testified that on the night of the fire, Hope Collins had disconnected the smoke alarm so that it would not sound while she attempted to cook dinner.

While this information may have been somewhat valuable to the defense team, it is not as supportive as would appear initially. First, according to her affidavit, Villarreal "thinks" she remembers telling this information to defense counsel but is unsure. (Defendant Ex. 2 to Villarreal Dep. at 3.) Thus, petitioner's factual premise for asserting part of this claim is on uncertain ground. Moreover, even if counsel had known of this information, it may not have been prudent to utilize it. First, the strategy of "blaming the victim" for the fire may have backfired. The panel would have had to find that Cynthia awoke at 4:00 a.m., started a fire in the living room, then returned to her bedroom. This is a dubious scenario. Moreover, although Richey contends that he chose a bench trial to circumvent juror sympathy for Cynthia Collins, utilizing this tactic may have swayed against Richey. There simply is no evidence other than pure conjecture that Cynthia Collins started the fire. Finally, the information that Hope Collins herself disconnected the fire alarm is inconsistent with the position in which the state Fire Marshall found the smoke detector after the fire, i.e., hanging from its wires. Hope's method of disconnecting the alarm to keep it from sounding while cooking was to turn off the breaker or manually fan the air in front of the smoke detector. Thus, this information, if defense counsel was aware of it, may not have aided in Richey's defense. Because there is no sound factual basis on which to assert counsel was made privy to helpful

information before trial yet refused to utilize it, the Court finds counsel's conduct not unreasonable and this sub-claim not well-taken.

Finally, in Richey's twelfth sub-claim, he alleges counsel's ineffectiveness for failure to insure that portions of the pre-sentence investigation report, in particular a letter Richey wrote to a friend in Scotland regarding his shooting of "Gogs," was fully explained. The basis for asserting the ineffectiveness in this sub-claim was addressed *supra* in ground for relief fifteen and found to be without merit. Thus, the Court determines that because it was not prejudicial for the trial court to admit a redacted portion of the letter into evidence in the presentence report, Richey's counsel was not ineffective for failing to object to its introduction. Moreover, the Ohio Supreme Court's analysis of this claim comports with § 2254(d)(l). That court found that counsel's decision not to object to the presentence report "was within the range of professional discretion and cannot be second-guessed on appeal." 595 N.E.2d at 927. Consequently, the Court finds this sub-claim is not well-taken.

Ground 21: Even if each of the individual deficiencies of Richey's trial counsel performance did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

In this ground for relief, Richey contends that even if the Court found none of his individual sub-claims constituted ineffective assistance of counsel that, somehow, when considered in unison, the Court should determine counsel was ineffective. Respondent does not allege this claim is procedurally defaulted, thus, the Court addresses this claim on the merits.

Richey cites no case law that instructs a habeas court

to consider the cumulative effect of ineffective assistance of counsel claims when it finds each individual claim is insufficient. Generally, accumulated errors are not equivalent to reversible error "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). If error occurred, but without constitutional significance, then the error is deemed harmless and the verdict sound. *Id.* Additionally, circuit courts have held that cumulative ineffective assistance of counsel claims are not cognizable. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998), *cert. denied*, 526 U.S. 1035 (1999); *Griffin v. Delo*, 33 F.3d 895, 903-04 (8th Cir. 1994), *cert denied*, 514 U.S. 1119 (1995). Because the foregoing assertions of counsel's ineffectiveness were found to be without merit, the Court determines this claim to be equally non-meritorious.

Ground 22: Richey received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments.

The Court previously reviewed this claim in section VI. B. 2 *supra* when determining whether Richey could assert ineffective assistance of appellate counsel to excuse procedural default. In that section, it was determined that Richey could not establish that appellate counsel was objectively unreasonable. That analysis will be repeated here along with the analysis regarding whether Richey can establish that appellate counsel's conduct was prejudicial.

In the twenty-second ground for relief, Richey alleges ineffective assistance of appellate counsel in a two-step fashion: First, Richey contends there are numerous claims counsel failed to raise on direct appeal.[43] Second, Richey

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[43] Specifically, Richey alleges that appellate counsel failed to raise the following nineteen issues:

1) application of transferred intent theory
2) variance between the intent theories in the indictment and evidence presented during trial
3) insufficient evidence to find intent to kill Cynthia Collins
4) difference in intent theories between the indictment and Bill of Particulars
5) insufficient evidence to prove that Richey formed a specific intent to kill Candy Barchet and/or Mike Nichols
6) the verdict was ambiguous and in violation of Richey's right to a unanimous verdict
7) Ohio's statutory definition of "reasonable doubt" falls below the standard required by the Ohio and federal constitutions
8) trial error to require Richey to waive right to jury trial one month before trial
9) state permitted to introduce irrelevant and prejudicial testimony
10) three-judge panel found that Richey pulled smoke detector from ceiling
11) residual doubt
12) three-judge panel required Richey to "justify" rather than "mitigate"
13) Ohio death penalty unconstitutional because it places an increased risk on capital defendants opting for trial
14) prejudice resulting from the introduction of the presentence
investigation report
15) not enough ineffective assistance of counsel issues raised
16) prejudicial portion of letter introduced during trial
17) Ohio applies Ohio Rev. Code § 2929.05 without

asserts that counsel failed to raise these claims because of a conflict of interest arising between trial counsel and the chief of the capital crimes section of the Ohio Public Defender's Commission. Specifically, one of Richey's appellate counsel, Kenneth Murray, contends that his supervisor, David Stebbins. ordered him to remove all ineffective assistance of trial counsel claims because of his friendship with William Kluge, Richey's trial counsel. (Murray Dep. at 50.) As addressed in section VI. B. 2 *supra*, these claims are not procedurally defaulted.

Based on the discovery taken in this proceeding counsel's behavior was not objectively unreasonable. Certainly, if the scenario Murray alleges occurred were authenticated, counsel's behavior would satisfy the first *Strickland* prong. It is undoubtedly unreasonable for a supervisor to order the removal of colorable ineffective assistance of counsel claims merely because of a personal relationship with trial counsel. Richey is unable to prove this fact, however. In the depositions of both Murray and Stebbins, neither affirmatively state that the reason for Stebbins' request was because of his personal relationship with Kluge.

In Murray's deposition, he testified that Stebbins met with him on one occasion to request that he remove all ineffective assistance of counsel claims from his appellate brief. Although Murray indicated that he believed Stebbins' order was based on his friendship with Kluge,[44] Murray also

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adequate safeguards
18) state's failure to record grand jury proceedings
19) Ohio death penalty is facially unconstitutional

[44] During the deposition the following exchange took place:

Petitioner's Counsel: Did you believe when Mr. Stebbins directed you not to

indicated that the stated reason at the time of their meeting was that Stebbins was concerned that these issues would be better supported by evidence outside the record. Therefore, raising them prematurely on direct appeal would bar a post-conviction review. (Murray Dep. at 28.) Similarly, while Stebbins revealed during his deposition that he had no independent recollection of his meeting with Murray on this case, he noted that the issue of when to raise ineffective assistance of counsel claims was, and remains, a difficult one to decipher. (Stebbins Dep. at 50.) Thus, both agree that, at least facially, Stebbins' grounds for ordering the ineffective assistance of counsel claims be removed from the appellate brief are part of a tactical decision that would not run afoul of *Strickland.*

The Court also determines that Richey cannot establish that appellate counsel's behavior prejudiced his appeal. All claims raised in this ground for relief were raised as separate claims elsewhere in Richey's Petition. *See* grounds for relief two, three, four, five. six, seven, nine, ten, fifteen, seventeen, nineteen, twenty, twenty-four, twenty-six, twenty-seven. As the Court finds that those claims lack merit,

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include ineffective assistance of counsel claims in Mr. Richey's direct appeal brief that the reason for Mr. Stebbins' directive was his friendship with Mr. Kluge?

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Murray: Yeah, that's what I thought was happening, that they were friends and he didn't want me to attack Bill in the brief.

(Murray Dep. at 50.)

Richey's ineffective assistance of counsel claims also fail because he cannot establish prejudice resulting from counsel's failure to raise the nineteen claims Richey lists in his Petition. Consequently, because Richey has asserted, and this Court has addressed and rejected all underlying claims for relief asserted in this ground, Richey cannot show that any objectively unreasonable behavior in which appellate counsel may have participated was prejudicial to him. Barring such a showing, the Court finds Richey's twenty-second ground for relief is without merit.

Ground 23: Based upon record evidence, the sentence of death imposed upon Riehey was inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

Richey argues in this ground for relief that, based on the evidence the three-judge panel reviewed in mitigation. the death penalty is an inappropriate sentence for him. Richey points to the circumstantial nature of the evidence, the fact that he attempted to rescue Cynthia Collins, and the fact that the prosecutor offered him a plea bargain prior to trial as mitigating evidence to which the panel did not assign the proper weight. Respondent acknowledges that, other than the plea bargain portion of the claim. Richey raised this claim to the Ohio Supreme Court as Proposition of Law XVIII. Richey does not contest respondent's analysis, thus, the Court considers this claim on the merits, except for the evidence regarding the prosecutor's attempt to plea bargain with Richey prior to trial.

Richey's argument fails as it lacks any issue which a federal habeas court can recognize. "On collateral review, federal courts are not required to re-examine a state court's good faith findings." *Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996), *aff'd*, 522 U.S. 269 (1998). Nor can this

Court sit as a tertiary appellate court once the state appellate and supreme courts have re-weighed the aggravating and mitigating factors and articulated them sufficiently to satisfy the requirements of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In fact, Supreme Court jurisprudence teaches that "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Tuilaepa v. California*. 512 U.S. 967, 979-80 (1994)(quoting *Zent v. Stephens*, 462 U.S. 862, 875 (1983)(further citations omitted). Thus, even if this court disagreed with the outcome of the sentencing proceeding, this Court has no authority with which to re-weigh the aggravating and mitigating factors.

Richey further argues that because the trial court found that he pulled the smoke alarm from the ceiling, that the trial court utilized an impermissible, non-statutory aggravating circumstance when sentencing him. The Court addressed this argument in Richey's sixteenth and eighteenth ground for relief, *supra* and, consequently, need not re-address it here. Finally, the Court must defer to the Ohio Supreme Court's appropriateness review unless it is "contrary to, or involved an unreasonable application of, clearly established federal law" or "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). As noted in the above grounds for relief, the Ohio Supreme Court did not make an unreasonable appropriateness review of the aggravating circumstances and mitigating factors in Richey's case, and because Richey asserts no federally cognizable claim, the Court determines his twenty-third ground for relief is not well-taken.

Ground 24: Based upon new evidence, the sentence of death imposed upon Richey is inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and

Fourteenth Amendments.

In his twenty-fourth ground for relief, Richey complains that his death sentence is inappropriate based upon evidence produced during this proceeding. Specifically, Richey points to the deposition of Peggy Villarreal stating that it was Hope Collins who disconnected the smoke alarm on the night of the fire. Alternatively, Richey argues, the smoke alarm may have melted during the heat of the fire, as Custer suggests.

Respondent alleges this claim is both exhausted and procedurally defaulted. The claim is exhausted because Richey has no further remedies available to him pursuant to state law. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Because he has no state remedy available yet he has never presented this claim to state court, a federal habeas court must deem this claim procedurally defaulted and may address it only upon petitioner's showing of cause and prejudice. *Id.* In response to respondent's assertions, petitioner merely claims that the Ohio Supreme Court considered Richey's appropriateness claim on direct review but fails to explain how the court could have reviewed the evidence Richey presents in this claim that was not before it. Thus, the Court determines that this claim is procedurally defaulted.

Nonetheless, the Court determines that this ground, like ground twenty-three, is not cognizable in this proceeding. In this ground for relief, Richey, in essence, asks this Court to conduct its own appropriateness review but provides the Court no law to support this request. Were this Court to undertake such a task, the evidence Richey presents would not warrant relief given the deference to which a federal habeas court must afford a state court conviction. As stated previously in this Opinion, the evidence produced by discovery in this case does not contradict, but merely undermines evidence presented during trial. Thus, Richey's allegations that the evidence produced during this proceeding

render the death penalty inappropriate in this case are unfounded. As such, the Court determines Richey's twenty-fourth ground for relief lacks merit.

Ground 25: The restricted manner in which Ohio applies its proportionality review violated Richey's due process rights under the Fifth and Fourteenth Amendments, and renders Ohio's capital sentencing system inadequate to safeguard against the arbitrary and capricious imposition of the death penalty.

Ground 26: Ohio's death penalty statute is unconstitutional because its proportionality review statute is arbitrarily and capriciously applied.

In the above grounds for relief. Richey contends that the Ohio Supreme Court improperly applied the Ohio Revised Code § 2929.05, Ohio's proportionality statute in *State v. Steffen*, 509 N.E.2d 383 (Ohio 1987). In that case, Richey alleges, the court limited the comparison of a death-sentenced individual to others who received the death penalty, rather than to those capital defendants who received a life sentence. Additionally, the *Steffen* decision permitted appellate courts to geographically limit the cases for comparison to those within its jurisdiction. Moreover, because the Ohio courts have not prepared reports on every capitally indicted individual, Richey complains that Ohio courts have disregarded the mandate of Ohio Revised Code § 2929.03(F), which requires a trial court to prepare such reports on all capitally charged individuals. Because of this statutory misinterpretation, Richey avers that his own proportionality review was tainted. Citing the dissent in his direct appeal case from the Ohio Supreme Court, Richey notes that he, unlike other death-sentenced defendants.

neither harbored animosity towards the victim, Cynthia Collins, nor did he engage in a face-to-face encounter with the victim. Richey turns to this Court for relief.

Initially, the Court should note that portions of this claim are procedurally defaulted. While Richey did raise the proportionality of the death sentence on direct appeal to the Ohio Supreme Court in Propositions of Law XX and XXI, portions of the claims he raises here were not raised in that court. Specifically, Richey did not raise the restricted pool of cases issue. Thus, respondent contends, it is procedurally defaulted. Richey counter-argues that he did raise this claim during *Murnahan* proceeding and ineffective assistance of appellate counsel establishes cause to excuse the default. As stated above, however, this argument is unpersuasive and the Court determines this portion of the claim is procedurally defaulted.

A review on the merits does not prove fruitful for Richey. As stated above, a proportionality review is not constitutionally required. 465 U.S. 37, 50-51 (1984); *see also McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996), *cert. denied*, 469 U.S. 893 (1997)("There is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review."). Ohio does, however, provide for an appellate proportionality review. Pursuant to Ohio Revised Code § 2929.05(A):

> In determining whether the sentence of death is appropriate the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating

> circumstances the offender found guilty of committing and the mitigating factors.

Because Ohio law requires appellate courts to provide a proportionality review, its review must be consistent with constitutional requirements. *See, e.g., Kordenbuock v. Scroggy*, 680 F. Supp. 867, 899 (ED. Ky. 1988)(citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). Although a district court must determine whether such review is constitutionally effectuated, that review, nevertheless, is a limited one. The district court is to examine the state's proportionality review *only* to determine whether the imposition of the death penalty is patently unjust or "'shocks the conscience'; the Court is not to second-guess the state court's comparison of other cases in which the death penalty was imposed." *Id.* (citing *Moore v. Balkcom*, 716 F.2d 1511, 1517(11th Cir. 1983), *cert. denied*, 465 U.S. 1084 (1984)).

In the instant case, the Ohio Supreme Court articulated its proportionality analysis so as not to deny Richey a meaningful proportionality review. Upon reviewing all proffered mitigating evidence that court stated:

> Despite this mitigation evidence, the aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.
>
> The death penalty is appropriate and proportionate when compared with similar felony murder cases. *See*

> *State v. Bonnell* (1991), 62 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State v. Lott*, *supra* (felony murder, victim set on fire); *State v. Seiber*, (1990), 56 Ohio St.3d 4, 564 N.E.2d 408 (felony murder); *State v. Powell*, (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State v. DePew*, *supra* (felony murder including arson, three victims including seven-year-old); *State v. Morales*, (1987)32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State v. Buell*, (1986) 22 Ohio St.3d 124,22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old victim); *State v. Maurer*, *supra* (felony murder, seven-year-old victim).

595 N.E.2d 915, 931 (Ohio 1992).

The Ohio Supreme Court's analysis satisfied its obligation under Ohio Revised Code § 2929.05(A) and the United States Constitution. *See Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987), *cert. denied*, 489 U.S. 1059 (1989)(holding that state appellate courts need not "make an explicit, detailed account of their comparisons" because, "based on their own past experience in reviewing capital punishment cases, state appellate courts 'can rationally distinguish between those individuals for whom the death penalty is an appropriate sanction and those for whom it is not")(quoting *Spazicino v. Florida*, 468 U.S. 447 (1984)). Even if the Court were to agree that the *Richey* dissent correctly identified several circumstances that would determine the death penalty inappropriate,[45] the verdict does

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[45] In his dissent, Justice Brown noted, in addition to the fact that Richey harbored no animosity towards Cynthia Collins, that "[s]everal cases are cited by the majority to show the proportionality of the death penalty in this case. However, if one reads those cases (which are merely listed and not

not "shock the conscience" as is required for this Court to find the verdict unconstitutional.

Richey makes a last attempt to successfully assert a proportionality claim by alleging that the proportionality review statute creates a liberty interest. Petition at 176 n.55. Citing *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), in which the Sixth Circuit determined the Tennessee proportionality statutes did not create a liberty interest because they set up procedures that put specific limits on official discretion, Richey underscores the fact that the Ohio proportionality statute does direct the courts how to undertake a proportionality review and defines the terms of proportionality by requiring courts to set up a database of cases. As respondent notes, however, the Sixth Circuit recently reviewed the Ohio proportionality statute and determined that it does not create a liberty interest. *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000). Accordingly, the Court determines claims twenty-five and twenty-six are not well-taken.

Ground 27: Richey's rights under the Fifth, Eighth, and Fourteenth Amendments were violated because other aspects of Ohio's death penalty statute are unconstitutional on their face and as applied to Richey.

In the twenty-seventh ground for relief, Richey alleges that the Ohio death penalty scheme is fraught with constitutional infirmity. Richey claims eight provisions of the Ohio statutes infringe on his constitutional rights. These sub-claims are:

1) the Ohio statutes do not require the state to prove

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analyzed by the majority), it is obvious that not one remotely resembles this one." 595 N.E.2d at 933.

the defendant had the conscious desire to kill

2) the Ohio statutes fail to require proof beyond *all* doubt to convict

3) the Ohio statutes do not require the state to prove the absence of mitigating factors and that the death penalty is the only appropriate remedy

4) the Ohio statutes require the state to prove specifications of aggravating circumstances during the guilt phase of a capital trial

5) capital defendants who exercise their right to a jury trial are at greater risk to receive the death penalty than those who make plea agreements

6) the pre-sentence investigation report, once ordered by the defendant, is submitted to the prosecution and the trial court

7) Ohio courts perform a cursory appropriateness review of death sentences

8) the Ohio statutes deprive the sentencer of the option to choose life imprisonment in instances where it finds the aggravating circumstances outweigh the mitigating factors

Of these eight sub-claims, respondent alleges that three of them, sub-claims (5), (6), and (7) are procedurally defaulted because Richey did not raise these arguments until his application to re-open his direct appeal. As noted in section VI., B., 2., above, Richey cannot establish cause to excuse his procedural default. Thus, the Court determines sub-claims (5), (6), and (7) are procedurally defaulted.

Regardless of their defaulted status, the Court also determines that they lack merit. In sub-claim (5), petitioner contends that the Ohio death penalty statutes impose a greater risk of death on those capital defendants who choose to exercise their right to trial. In *United States v. Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial. In that case, the Court struck down the capital portions of a federal kidnaping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after trial." *State v. Buell*, 489 N.E.2d 795 (Ohio 1986). Consequently, the Ohio scheme comports with the constitutional mandate.

In sub-claim (6), petitioner alleges it unconstitutional that the pre-sentence investigation report, once ordered by the defendant, must be disclosed to the prosecution and trial court. In *State v. Williams*, 490 N.E.2d 906, 913 (Ohio 1986), the Ohio Supreme Court cogently analyzed this claim based on federal precedent:

> The United States Supreme Court has held that confrontational rights do not apply to all types of hearings. *Wolff v. McDonnell* (1974), 418 U.S. 539. All that due process requires with respect to post-conviction reports is giving the defendant the chance to rebut any alleged inaccuracies. *See Gregg v. Georgia* (1976), 428 U.S. 153, 189 fn.37; *United States v. Papajohn* (C.A.8. 1983), 701 F.3d 760, 763; and *Farrow v. United Stales*, (C.A.9, 1978), 580 F.2d 1339, 1360.

Because Richey was afforded due process during the mitigation phase, there is no merit to this claim.

In sub-claim (7) Richey alleges that the appellate courts provide a cursory appropriateness review. The Court addressed the appropriateness review in ground for relief twenty-four and found the Ohio courts perform this review in a constitutionally permissible manner. The Court need not re-address that argument here.

Of the claims that Richey raised before the Ohio Supreme Court, none possess merit. In sub-claim (1), Richey takes issue with the fact that Ohio Revised Code § 2903.01(B) permits a court to convict a defendant of murder without first proving the defendant possessed a conscious desire to kill. The Supreme Court has sanctioned the use of a criminal state of mind less culpable than intent, i.e.. reckless indifference, as an acceptable level of culpability to impose the death penalty. *See Tison v Arizona*, 481 U.S. 137, 156 (1986)(affirming death sentence of capital defendant who took part in prison escape but was not present when murder of kidnaped family occurred).

Richey's second sub-claim, that the Ohio scheme fails to require the state to convict only after providing proof beyond *all* doubt stands on faulty constitutional ground. *In re Winship*, 397 U.S. 358. 364 (1970) explicitly stated that the standard required to convict a criminal defendant is "proof beyond a reasonable doubt."

Richey's third argument was specifically rejected in *Walton v. Arizona*, 497 U.S. 639, 649-50 (1990). In that case the Court held that a death penalty scheme requiring the defendant to establish mitigating factors by a preponderance of evidence is constitutionally acceptable burden shifting. Moreover, Richey's assertion that the state must prove that the death penalty is the only appropriate remedy also is misplaced. No such constitutional mandate exists. Finally, the Ohio scheme provides for an appropriateness review on direct appeal. *See* ground for relief twenty-four, *supra.*

In sub-claim (4), Richey argues that the Ohio statutes require the state to prove specifications of aggravating

circumstances during the guilt phase of a capital trial. The Ohio death penalty comports with Supreme Court jurisprudence that requires a state statutory scheme to limit the class of death-eligible defendants. Moreover, use of the aggravating circumstances proved during the guilt phase was upheld in *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1987); *see also Walton v. Arizona*, 497 U.S. 639 (1990)(specifically upholding this type of system).

Finally, in sub-claim (8) Richey claims that the Ohio death penalty scheme is unconstitutional because it fails to provide the sentencing authority the option to impose a life sentence after finding that the aggravating circumstances outweigh the mitigating factors. The Supreme Court rejected the identical argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). Because none of Richey's sub-claims successfully allege the Ohio death penalty scheme's unconstitutionality, the Court finds this ground for relief is not well-taken.

Ground 28: The State violated Richey's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments when it failed to disclose material exculpatory evidence.

Richey alleges in the twenty-eighth ground for relief that the prosecutor withheld exculpatory information from him during trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Essentially, Richey claims that discovery in this proceeding uncovered two facts that were exculpatory and within the state's control. First, Richey claims the Putnam County Sheriff's Department had in their file handwritten notes that "some of the tenants turned off smoke alarms because they were sensitive to cigarette smoke." Steve Stechschulte seemingly confirmed this statement during depositions taken in this proceeding when he affirmatively responded to the question that his investigation led him to

information that tenants in the Old Farm Village Apartments often disconnected their smoke detectors because they were sensitive. (Stechschulte Dep. at 138-39.) Second, Richey contends that the prosecution withheld information it obtained from Peggy Villarreal Price that on the night of June 29, 1986, Hope Collins had disconnected the smoke detector while cooking dinner. Both these facts, Richey argues, would have altered the outcome of the guilt and sentence phases of trial particularly because the trial court focused on its finding that Richey pulled the smoke detector from the ceiling when it determined Richey did not establish any mitigating evidence.

Respondent asserts that this claim is procedurally defaulted. Richey initially raised this claim in his recent second-post conviction relief petition. The trial court declined to hear the petition on its merits, noting that Richey could not overcome the hurdle set forth in Ohio Revised Code § 2953.23. That statute states:

> (A) . . . a court many not entertain a petition flied after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:
> (1) Either of the following applies:
> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief
> (b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a

> claim based on that right.
> (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the claim challenges a sentence of death, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

Subjecting this claim to the four-prong *Maupin* test, the Court finds this claim procedurally defaulted. First, the Ohio court articulated a procedural rule that is applicable and with which Richey failed to comply. Second, this statute is actually enforced and represents an adequate and independent state ground as it is similar to the *res judicata* principle articulated in *State v. Perry* but applied in a successor post-conviction review context. Because Richey cannot establish cause and prejudice to excuse his non-compliance with the rule,[46] the Court determine this claim is procedurally defaulted.

Nevertheless, the Court will review the claim on its merits. To establish a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)(citing *Moore v. Illinois*, 408 U.S. 786,

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[46] Richey cannot allege ineffective assistance of counsel as cause to excuse the default here because there is no constitutional right to effective assistance of counsel on collateral review. *Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991).

794-95 (1972)). "The inquiry is objective. independent of the intent of the prosecutors." *Id.* (citing *Brady*, 373 U.S. at 87.)

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the proceeding. *United States v. Bagley.* 473 U.S. 667, 676 (1985). There is no *Brady* violation "Where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, – U.S. – , 120 S. Ct. 110 (1999)(citation and internal quotation marks omitted).

Recently, the Supreme Court expounded on the prejudice or "reasonable probability" prong of *Brady.* In *Strickler v. Greene*, 527 U.S. 263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of *Brady* by failing to provide exculpatory information to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of the petitioner's abduction of the victim and how she was able to remember such detail. *Id.* at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. *Id.* at 296. Mindful of this

law, the Court now addresses Richey's alleged *Brady* material.

Richey's claim fails two of the three *Brady* prongs. While the evidence may be characterized as favorable to the defense, this information was not within the exclusive control of the prosecution and therefore was not "suppressed" pursuant to *Brady*. The Court notes that in his first petition for post-conviction relief and in the Petition pending before this Court, Richey has argued that his trial counsel was ineffective for failing to utilize information Peggy Villarreal Price provided to counsel about Hope Collins disconnecting the smoke detector on the night of the fire. Consequently, his current assertion, that the prosecution withheld this information from the defense appears dubious.

Even if the Court were to disregard Richey's wavering assertion regarding Villarreal's disclosure to trial counsel, Richey cannot support his *Brady* claim. The fact that some tenants may have told police investigators that tenants disconnect their smoke alarms was not information exclusively within the state's control, indeed, the fact that Richey lived in the apartment complex and spent much time in the company of "A" Building residents would make him more aware of their practices than a police investigation might reveal. Moreover, this information is not material. Even if Richey had introduced evidence of practices of other residents, this information could hardly be relevant to who pulled the smoke detector from its wires during the fire. Had the prosecution withheld information specifically relating to how the smoke detector was found hanging from its wires, Richey's *Brady* claims might have stood on solid ground. Because this "exculpatory" information merely recites the general practices of those living in the complex, however, it is irrelevant to the state's assertion of how the smoke detector became disconnected. Because this information does not "undermine the confidence in the outcome" of the trial, the Court determines that the state's failure to produce this

evidence was not a *Brady* violation.

Similarly, the evidence that Hope Collins disconnected the smoke detector on the night of the fire, although relevant, cannot surpass the *Brady* test. First, as with the above evidence, this evidence, derived from Peggy Villarreal Price was not exclusively within the state's control. In fact, as noted above, defense counsel interviewed Price after the fire. Richey also cannot demonstrate that this information was material and would have altered the outcome of his trial. As in *Strickler*, there is ample additional evidence from which the trial court could determine that Richey set the fire that killed Cynthia Collins. Evidence of his prior statements that "A Building would burn," that he had access to accelerants and that those same accelerants were utilized to ignite the fire was sufficient for a trial court to find that Richey was its instigator.

Richey next argues that the information that it was Hope Collins, and not he, who disconnected the smoke detector was material as to whether he received the death sentence is more persuasive but ultimately must fail. Hope Collins testified that although she did often disconnect this smoke detector, she performed this task by one of two means. She either would flip off the switch on the fuse box or would fan the smoke away from the detector. In cases where she would manually fan the smoke, she often would unhook the cover of the smoke detector and let it swing from the hinges. She further testified that she at no point unscrewed the smoke detector, allowing it to dangle from its wires. Thus, had Richey presented evidence of Hope's prior practice of disarming the smoke detector, this information would not have deterred the panel from finding Richey had pulled it from the ceiling. Furthermore, even if the panel had not inferred that Richey disconnected the smoke detector, there was direct evidence that Richey knew Cynthia was asleep in a back bedroom when he started the fire. This evidence alone is sufficient to determine that Richey placed Cynthia in

harm's way, thus, his efforts to rescue her were not sufficient to mitigate his crime. Because there is ample evidence from which the panel could impose the death penalty on Richey excluding the smoke detector evidence, the Court determines that Richey cannot establish a *Brady* claim based on this information.

As Richey does not carry the burden of demonstrating that the prosecutor withheld exculpatory, material evidence that prejudiced the outcome of the proceeding pursuant to *Brady*, the Court determines that this claim is without merit.

VIII. Conclusion

For the foregoing reasons, the Petition is denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could be taken in good faith as to grounds 1, 9, 10, 16, 18, 22, 23 and 24 and the Court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b) as to those grounds only. As to all remaining grounds, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ PATRICIA A. GAUGHAN
United States District Judge

## APPENDIX D

NOT RECOMMENDED FOR PUBLICATION

No. 01-3477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| KENNETH T. RICHEY | ) | |
| | ) | |
| *Petitioner-Appellant,* | ) | |
| v. | ) | ON APPEAL FROM THE |
| | ) | UNITED STATES |
| BETTY MITCHELL, Warden) | | DISTRICT COURT FOR |
| | ) | THE NORTHERN |
| *Respondent -Appellee.*) | | DISTRICT OF OHIO |
| | ) | |

BEFORE: SILER, DAUGHTREY, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Kenneth Richey appeals the district court's denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. In 1987, Richey was found guilty of the aggravated felony murder of Cynthia Collins and sentenced to death. In his habeas petition, Richey contends, *inter alia,* that there was insufficient evidence to support his conviction because there was no evidence that he intended to cause the death of the actual victim. Because we are uncertain as to how Ohio defined the intent element of aggravated felony murder at the time of the offense, we respectfully certify a question to the Ohio Supreme Court before addressing Richey's constitutional claims.

## BACKGROUND

In January 1987, a three-judge panel convicted Richey of aggravated felony murder, aggravated arson, breaking and entering, and child endangerment. Following a sentencing hearing, Richey was sentenced to death in February 1987. Richey timely appealed his conviction and sentence, and the Ohio Court of Appeals affirmed the conviction, *see State v. Richey,* No. 12-87-2, 1989 WL 156562 (Ohio Ct. App. Dec. 28, 1989), and death sentence. *See State v. Richey,* No. 12- 87-2, 1989 WL 156561 (Ohio Ct. App. Dec. 28, 1989). In August 1992, a divided Ohio Supreme Court affirmed the conviction and sentence. *See State v. Richey,* 595 N.E.2d 915 (Ohio 1992). That court subsequently denied Richey's application for rehearing, *see State v. Richey,* 598 N.E.2d 1172 (Ohio 1992), and the United States Supreme Court denied his petition for a writ of certiorari. *See Richey v. Ohio,* 507 U.S. 989 (1993).

Represented by new counsel, Richey filed an untimely application for reconsideration pursuant to Ohio Rule of Appellate Procedure 26(B). Richey's new counsel claimed that his prior appellate counsel's ineffectiveness established good cause for the untimely filing. The appellate court identified the untimely filing as a "fatal procedural defect," found that Richey could not establish good cause, and denied the application. *State v. Richey,* No. 12-87-2 (Ohio Ct. App. Jan. 4, 1995). Richey then appealed to the Ohio Supreme Court, which affirmed the denial of Richey's application for the reasons stated by the court of appeals and, in part, because it found Richey had no constitutional right to counsel in his application for reconsideration. *See State v. Richey,* 653 N.E.2d 344 (Ohio 1995).[47]

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[47] We have previously rejected this alternate argument, holding that because the application for reconsideration is part of the direct appeal process. Petitioners are

Thereafter, Richey initiated state post-conviction proceedings. The Court of Common Pleas denied his petition, *see Findings of Fact, Conclusions of Law, Entry Denying Petition to Vacate or Set Aside Sentence without a Hearing,* No. CR 86-21, May 12, 1997; the court of appeals affirmed that decision, *see State v. Richey*, No. 12-97-7, 1997 WL 722782 (Ohio CL App. Nov. 18, 1997); and the Ohio Supreme Court declined review. *See State v. Richey*, 690 N.E.2d 1287 (Ohio1998). Richey next filed a second state post-conviction petition, which the trial court denied as an unauthorized second or successive petition. *See* O.R.C. 2953.23(A). The court of appeals affirmed that decision, *see State v. Richey*, No. 12-2000-03, 2000 WL 681642 (Ohio Ct. App. May 26, 2000), and the Ohio Supreme Court again declined jurisdiction. *See State v. Richey,* 736 N.E.2d 25 (Ohio Oct. 4, 2000).

Richey then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of Ohio in June 1998. The petition set forth 28 grounds for relief, including the 11 that are the subject of this appeal. We now consider only one issue raised by Richey: whether there was sufficient evidence to prove the level of intent required by the aggravated felony murder statute.

The facts necessary to consider this single issue are relatively straightforward. On June 30, 1986, a fire broke out in a second-floor apartment, killing Cynthia Collins. In the apartment directly below the Collinses' apartment, Candy Barchet, Richey's ex-girlfriend, and Mike Nichols, Barchet's new boyfriend, were sleeping. At trial, the prosecution introduced evidence showing that Richey felt possessive toward Barchet and was upset by Barchet's relationship with other men, including Nichols. The prosecution's theory was

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constitutionally entitled to the assistance of counsel in applying for reconsideration. *See White v. Schotten,* 201 F.3d 743, 752 (6th Cir. 2000)

that Richey set the fire in an attempt to harm Barchet and/or Nichols. As conceded by the state, there was no evidence that Richey intended to cause the death of Collins.

## DISCUSSION

### *1. Procedural Posture*

Richey concedes that his sufficiency claim has been procedurally defaulted but argues that we should nevertheless consider it, as well as his contention that his trial counsel and appellate counsel were ineffective for failing to present the issue to the state courts. Moreover, he argues that we should consider the claim that his appellate counsel was ineffective in failing to argue that his trial counsel was ineffective for not raising the issue.

Generally, we cannot reach the merits of a claim that has been defaulted in state court based on an independent and adequate state procedural ground. *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991). One exception to this general rule is those cases in which a petitioner is able to establish *both* cause for failing to raise the claim in the state courts *and* resulting prejudice. See id. Ineffective assistance of counsel, to the extent the ineffectiveness claim is not itself procedurally defaulted, can establish cause. *See Edwards v. Carpenter,* 529 U.S. 446, 453 (2000). To determine whether counsel was ineffective, we must determine (1) whether counsel's performance was deficient and (2) whether the petitioner was prejudiced by counsel's performance. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). In this instance, as explained below, we are uncertain about the elements of the offense and seek guidance from the Ohio Supreme Court in evaluating Richey's claim of insufficient evidence. By virtue of this uncertainty, we are also uncertain as to whether Richey can establish the prejudice necessary to a successful ineffective assistance of counsel claim. Without

knowing whether Richey was prejudiced by his counsel's failure to raise the claim, we cannot know whether he is able to establish "cause." Likewise, we are unable to determine whether Richey is able to demonstrate the "prejudice" required under the second prong of the cause and prejudice test.

In the necessarily circular route we take to assess our ability to consider procedurally defaulted claims, we must first evaluate the merits of the claim and then determine whether we can reach the merits of the claim. Therefore, our question about the intent element implicates not only the merits of the claim, but the procedural posture as well.

*2. Intent Requirement*

It is well established that "the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (citing *Jackson v. Virginia,* 443 U.S. 307,316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)).

Richey was convicted of aggravated felony murder in violation of Ohio Revised Code § 2903.01.[48] At the time of the fire, the statute provided,

> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated arson or arson . . . .

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[48] The statute was modified in 1996. Here, we are only concerned with the statute as it existed at the time of the offense.

* * *

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred . . . to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person *specifically intended to cause the death of the person killed,* and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

O.R.C. § 2903.01 (emphasis added).

Richey focuses on the italicized language to support his claim that subsection (D) was elemental and prohibited reliance on transferred intent to obtain an aggravated felony murder conviction. If the doctrine transferred intent is inapplicable, evidence of Richey's intent to cause the death of Barchet and/or Nichols is irrelevant. According to Richey's argument, the state was required to prove that he intended to cause the death of the person killed. But, the state concedes that there is no evidence that Richey intended to cause the death of Collins. Hence, Richey contends the state failed to prove a necessary element of aggravated felony murder.

In assessing a claim of insufficient evidence brought pursuant to § 2254, a reviewing federal court must identify the required elements by looking to the definition of the offense under state law. *See Gall v. Parker,* 231 F.3d 265, 287 (6th Cir. 2000). Specifically, we are admonished to "defer to state courts' construction of . . . state laws in making such determinations." *Id.* Accordingly, in our attempt to identify the intent requirement, we turn to the relevant decisions of the Ohio Supreme Court.

In *State v. Sowell,* 530 N.E.2d 1294 (Ohio 1988), the Ohio Supreme Court appeared to acknowledge that subsection (D) eliminated the use of transferred intent in cases of aggravated felony murder. In that case, the court considered Sowell's appeal from a conviction for aggravated murder under O.R.C. § 2903.01(A).[49] The conviction stemmed from an incident in which Sowell killed a bystander in a failed attempt to kill another person. Sowell contended that his conviction could not stand because subsection (D) precluded the prosecution's reliance on transferred intent. *See id.* at 1305. The Ohio Supreme Court rejected this argument, but provided the following explanation:

> Subsection (D) of O.R.C. 2903.01 deals specifically with subsection (B) of that statute, which defines the offense known as "felony murder." It does not affect O.R.C. 2903.01(A), which is involved in the case at bar, or our holding in *State* v. *Solomon,* [421 N.E.2d 139 (Ohio 1981)]. The doctrine of transferred intent is firmly rooted in Ohio law. See *Wareharn v. State* [25 Ohio St. 601 (Ohio 1874)]. Our decision in *State v. Solomon* remains good law and we reiterate our

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[49] Subsection (A) provides, "No person shall purposely, and with prior calculation and design, cause the death of another."

> holding that if one purposely causes the death of another and the death is the result of a scheme designed to implement the calculated decision to kill someone other than the victim, the offender is guilty of aggravated murder in violation of O.R.C. 2903.01(A).

*Id.*

In explaining why Sowell's argument failed, the Ohio Supreme Court strongly implied that subsection (D) was elemental and eliminated the doctrine of transferred intent from subsection (B). Our understanding of this opinion is based on two factors. First, the court relied on the distinction between subsection (A) and subsection (B) to reject Sowell's claim. In other words, the court appeared to accept the argument that subsection (D) was elemental, but limited its reach, consistent with the language of the statute, to subsection (B). Second, the court limited application of the doctrine of transferred intent to those cases in which "the death is the result of a scheme designed to implement the calculated decision to kill." *Id.* This language explicitly refers to cases of aggravated murder, but not to cases of aggravated felony murder. Although the outcome of Sowell's case turned on the applicability of the transferred intent argument to subsection (A), the Ohio Supreme Court seemed to recognize that transferred intent could not be used to secure an aggravated felony murder conviction.

Weighing against this reading of the statute is the fact that the Ohio Supreme Court did not endorse or apply it in its opinion affirming Richey's conviction and sentence on direct appeal. *See State v. Richey, 595* N.E.2d 915 (Ohio 1992). However, the court's failure to address the statutory question may well have resulted from defense counsel's failure to

present this precise claim,[50] although the court did recognize that transferred intent was implicated in the case against Richey:

> The evidence also established Richey's intention to kill Candy and Nichols. The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell,* [530 N.E.2d 1294, 1305 (Ohio 1988)]. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon,* [421 N.E.2d 139, 142 (Ohio 1981)].

595 N.E.2d 915, 925 (Ohio 1992). Thus, the court set out – as a general principle – the doctrine of transferred intent, but it did not address the impact (or lack thereof) of subsection (D) on the elements of aggravated felony murder in Richey's particular case. Accordingly, we are uncertain as to whether the Ohio Supreme Court was passing judgment on the present argument or was simply making a *sua sponte* observation about the doctrine of transferred intent.

We further hesitate to attribute to the Ohio Supreme Court an interpretation of the statute that eliminates the doctrine of transferred intent as applied to Richey's case because such an interpretation might implicate the Due Process Clause. Although we normally defer completely to a state court's interpretation of its own law, "due process bars courts from applying a novel construction of a criminal

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[50]Although an insufficient evidence claim was raised, it addressed nothing more than the wholly circumstantial nature of the evidence.

statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Put simply, "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). And the due process concerns over unforseen interpretations of a criminal statute are at their zenith when, as in this case, "the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction." *Id.* at 352.

Because at the time of Richey's conduct, the text of the statute and its treatment by the Ohio courts, appeared to eliminate the possibility that transferred intent could be used as a basis for a conviction under the Ohio aggravated felony murder statute, an interpretation to the contrary might raise serious concerns under the Due Process Clause. *See, e.g., Rabe v. Washington*, 405 U.S. 313, 316 (1972) (reversing as violative of Due Process Clause a state law conviction that rested on unforeseeable judicial interpretation of a criminal statute); *Bottle*, 378 U.S. at 350 (same); *see also Gall v. Parker*, 231 F.3d 265,305-06 (6th Cir. 2001) (granting writ of habeas corpus upon holding that elimination of element of a crime by state supreme court violated Due Process Clause when both the plain text of the statute and prior state court decisions instructed otherwise). First, the statute requires that the jury evaluate "whether the person specifically intended to cause the death *of the person killed.*" O.R.C. § 2903.01(D) (emphasis added). This language seems unambiguously to require that the defendant specifically have intended to cause the death of the person that actually died – a requirement contrary to the doctrine of transferred intent. Moreover, as we noted above, the Ohio Supreme Court strongly suggested in *Sowell* that the transferred intent doctrine did not apply to aggravated felony murder charges, and such an interpretation proved essential to its ultimate holding in that case. *See Sowell*, 530 N.E.2d at 1305. The Ohio Supreme Court's

reading of the statute to preclude the use of transferred intent was further confirmed by the Ohio Court of Appeals in *State v. Mullins*, 602 N.E.2d 769, 771 (Ohio Ct. App. 1992), in which the court noted that the doctrine of transferred intent "has apparently been removed by the legislature from application in aggravated murder cases."

In short, at the time of Richey's conduct, it appeared clear as a matter of Ohio law that his conduct could not be the basis for a conviction under the aggravated felony murder statute: an interpretation to the contrary would likely be "at odds with the statute's plain language and ha[ve] no support in prior [state court] decisions." *Rogers v. Tennessee*, 532 U.S. 451, 458 (2001). Because we do not lightly assume that the Ohio Supreme Court interpreted the statute in a way that would raise such serious concerns under the Due Process Clause, we certify to the Ohio Supreme Court the question whether transferred intent can support a conviction under the aggravated felony murder statute. Further, we stay Richey's execution until we have issued our final judgment.

## ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF OHIO

Because we are unable to discern the intent requirement of aggravated felony murder from the Ohio Supreme Court's construction of the statute, we respectfully certify the following question:

> As provided by O.R.C. § 2903.01 in June 1986, is intent to cause the death of someone other than the actual victim sufficient to establish the requisite intent for aggravated felony murder?

Pursuant to Ohio Supreme Court Practice Rule XVIII, we provide the following required information:

(A) CAPTION OF THE CASE: *Richey v. Mitchell,* NO-01-3477.

(B) STATEMENT OF FACTS/QUESTION TO BE ANSWERED: The nature of the case, the circumstances from which the question arises, and the question to be answered have been explained *supra.*

(C) NAMES OF EACH PARTY: Kenneth Richey (Appellant ) and Betty Mitchell, Warden (Respondent).

(D) COUNSEL FOR EACH ARTY:

(1) For Petitioner-Appellant Richey: Paul E. Nesmer and Kenneth J. Parsigian, Goodwin Procter LLP, 53 State Street, Exchange Place, Boston, MA 02109-2881, telephone (617)570-1000.

(2) For Respondent-Appellee Mitchell: Michael J. Collyer, Assistant Attorney General, Capital Crimes Section, 615 W. Superior Aye, 11th Floor, Cleveland, OH 44113, telephone (216)787-3030.

(E) MOVING PARTY: Kenneth Richey.

Accordingly, the clerk of this court is directed to serve copies of the certification order upon all parties or their counsel of record and file with the Ohio Supreme Court the certification order under seal, along with proof of service.

/s/ R. Guy Cole, Jr.
R. Guy Cole, Jr.
United States Circuit Judge

SILER, Circuit Judge, dissenting. Neither party has asked this court to certify any questions to the Ohio Supreme Court. This is just another delay in reaching the merits of the habeas corpus petition. I do not deny that we may certify a case to the state supreme court in an appropriate case, *see Stewart v. Smith,* 534 U.S. 157, 159-60 (2001), but this practice should be effected very sparingly in habeas corpus cases when a state supreme court has already exhaustively reviewed the case.

An example of such a mistake in certifying a case to a state supreme court is found in *House v. Bell,* 311 F.3d 767(6th Cir. *2002)(en banc).* There, we certified questions to the Tennessee Supreme Court. Approximately one year later, the Tennessee Supreme Court declined to answer the certified questions, so the case has returned to our court on the same issues as before. See *House v. Bell,* M2003-01 952-SC-523-CQ, 2003 Tenn. LEXIS 1155 (Tenn. Dec. 1,2003).

Likewise, in the ease at bar, I can see no reason for the Ohio Supreme Court to respond to our question. As the majority opinion correctly states, on direct appeal that court already decided the certified issue. As that court stated then:

> The evidence also established Richey's intention to kill Candy and Nichols. Before the fire, Richey threatened Candy and any new boyfriend she would acquire. At the party, Richey specifically threatened to burn Building "A." He then set the fire in a jealous rage directed at Candy and her new boyfriend. The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firm rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St. 3d 322, 332, 530 N.E. 2d 1294, 1305 . . . . In this case, substantial evidence existed to sustain all the

elements of the offenses charged, and the panel's verdict stands.

The Ohio Supreme Court discussed the *Sowell* case and had the issue before it, regardless of whether it was raised by Richey. The issue was decided as a matter of state law, and now we are certifying it back to the same court that discussed it more than ten years ago in this case. Richey has cited no Ohio Supreme Court decisions since 1992 that bring this doctrine into question.

Without expressing my opinion on all of the issues which Richey raises before our court, I am of the firm opinion that the Ohio Supreme Court has already spoken on the issue to be certified, and that we should proceed to resolve the other issues before us. Therefore, I respectfully dissent on certifying this question to the Ohio Supreme Court.

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 2nd day of April, 2004, by ordinary United States Mail, to Paul E. Nesmer and Kenneth J. Parsigian, Goodwin Procter LLP, 53 State Street, Exchange Place, Boston, Massachusetts 02109-2881, counsel for petitioner-appellant; Michael J. Collyer, Assistant Attorney General, Capital Crimes Section, 615 W. Superior Avenue, 11th Floor, Cleveland, Ohio 44113, counsel for respondent-appellee.

/s/ Leonard Green
Leonard Green, Clerk

(Seal)

**APPENDIX E**

Richey v. Mitchell.

2004-0572.

SUPREME COURT OF OHIO

102 Ohio St. 3d 1468; 809 N.E.2d 1156

June 9, 2004, Decided

Moyer, C.J., Resnick, F.E. Sweeney, Pfeifer, Lundberg Stratton and O'Connor, JJ., concur. O'Donnell, J., dissents.

MERIT DECISION WITHOUT OPINION

On review of preliminary memoranda, motion for admission pro hac vice of Paul E. Nemser by Georgia Elizabeth Yanchar, motion for admission pro hac vice of Daryl L. Wiesen by Georgia Elizabeth Yanchar, and motion for admission pro hac vice of Kenneth J. Parsigian by Georgia Elizabeth Yanchar. The court declines to answer the certified questions. This cause is therefore dismissed.

Moyer, C.J., Resnick, F.E. Sweeney, Pfeifer, Lundberg Stratton and O'Connor, JJ., concur.

O'Donnell, J., dissents.

The motions for admission pro hac vice are granted.

**APPENDIX F**

THE STATE OF OHIO,
APPELLEE,

v.

RICHEY,
APPELLANT.

No. 90-338

SUPREME COURT OF OHIO

64 Ohio St. 3d 353; 595 N.E.2d 915

March 17, 1992, Submitted
August 12, 1992, Decided

APPEAL from the Court of Appeals for Putnam County, No. 12-87-2.

Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's second-floor apartment, killing Cynthia Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.

Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events

lived at the Old Farm Village Apartments in Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15, and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 a.m., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying, "If I can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives" in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said,

"Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying, "A Building was going to burn * * *." Juanita Altimus, while just outside her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 a.m., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 a.m., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] -- she's asleep -- but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 a.m., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from the K & J Greenhouse for Candy, and police found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview.

In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment; he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.

A grand jury indicted Richey for aggravated murder with a specification alleging murder in the course of arson, aggravated arson, breaking and entering (the greenhouse), involuntary manslaughter, and child endangering. A panel of three judges convicted Richey of all charges, save the manslaughter charge, which was dropped. Following a presentence investigation, mental evaluation, and mitigation

hearing, the panel sentenced Richey to death for aggravated murder and consecutive prison terms for the other offenses. The court of appeals affirmed the convictions and sentence.

*Daniel R. Gerschutz*, Prosecuting Attorney, for appellee.

*Randall M. Dana*, Ohio Public Defender, *Jane P. Perry* and *Kevin L. Fahey*, for appellant.

Moyer, C.J. We have reviewed appellant's twenty-three propositions of law, independently assessed the evidence relating to the death sentence, balanced the aggravating circumstance against the mitigating factors, and compared the sentence to those imposed in similar cases. As a result, we affirm the convictions and sentence of death.

I

Evidence of Threats

In his first proposition of law, Richey argues that admitting evidence of his threats destroyed the constitutionally required reliability and fairness of his trial and sentence. This evidence included the following. Richey told Deputy Roy Sargent on November 19 that "Randy Bassinger [the prosecutor] was a dead man" and that "whoever testified against him had better hope he's six feet under." On August 17, Richey told Deputy Mike Ball to take a message to Randy Bassinger, "that when he got out he was going to cut his throat."

While in pretrial confinement, Richey initiated conversations with his jailers about the offenses charged against him. Richey's threats were simply part of those conversations. Although Richey moved to suppress these statements, he did not object specifically to evidence of the threats. Hence, the issue is waived except for plain error.

*State v. Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364; *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

Richey's threats reflect a consciousness of his guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses. See *State v. Eaton* (1969), 19 Ohio St.2d 145, 48 O.O.2d 188, 249 N.E.2d 897 (flight from justice may indicate a consciousness of guilt); *Cleveland v. McNea* (1952), 158 Ohio St. 138, 142, 48 O.O. 68, 70, 107 N.E.2d 201, 203 (suppression of adverse evidence constitutes a prejudicial circumstance of much weight); *State v. Huffman* (1912), 86 Ohio St. 229, 99 N.E. 295; *Moore v. State* (1853), 2 Ohio St. 500; 2 McCormick on Evidence (4 Ed.1992), Sections 263, 265; 2 Wigmore on Evidence (Chadbourn Rev.1979 and 1991 Supp.), Sections 273, 276 and 278.

However, even if we were to find the evidence improper, no plain error is apparent. The circumstantial evidence against Richey was compelling in view of his explicit threat that Building "A" would burn that night, his motive and opportunity to start the fire, and the other circumstances. In *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, 2 O.O.3d 249, 267, 357 N.E.2d 1035, 1056, vacated in part (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155, we found evidence about threats against deputies to be harmless error even though wrongfully admitted, over objection, in an aggravated murder prosecution. Additionally, in a bench trial, the court must be presumed to have "'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759.

In Proposition of Law II, Richey argues that the judges of the panel, having been persuaded at the trial's outset that Richey was dangerous, should have disqualified themselves.

At the trial, the prosecutor moved that Richey's hands and feet be shackled. However, the panel ordered Richey's feet shackled but left his hands free.

Admittedly, "no one should be tried while shackled, absent unusual circumstances." *State v. Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311, 318. However, shackling is left to the trial court's sound discretion. *State v. Woodards* (1966), 6 Ohio St.2d 14, 23, 35 O.O.2d 8, 13, 215 N.E.2d 568, 576. In this case, defense counsel did not object to the shackling, and Richey had repeatedly threatened to kill the prosecutor and witnesses against him. Under the circumstances, we find no prejudicial error. Compare *Woodards v. Cardwell* (C.A.6, 1970), 430 F.2d 978, with *Kennedy v. Cardwell* (C.A.6, 1973), 487 F.2d 101; Annotation (1979 and 1991 Supp.), 90 A.L.R.3d 17. On its own motion, the court ruled that deputies could wear firearms and could search anyone entering the courtroom, but those orders reflected routine housekeeping functions. See R.C. 2945.03.

Even though the judges had been exposed to evidence about Richey's threats, they did not need to recuse themselves. Richey accepted the panel and raised this issue neither at trial nor before the court of appeals. Hence, we need not consider this issue. *State v. Williams, supra; State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772.

*State v. Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, is distinguishable. *Gillard* involved a ruling on *ex parte* evidence in a closed hearing under Crim.R. 16(B)(1)(e). Also, *Gillard* did not announce a *per se* prejudice rule. In this case, as in *Gillard*, the trial judges are presumed not to have improperly used the evidence about threats in their subsequent deliberations. *State v. Post, supra*. Nothing in the

record indicates they did so, and the evidence of guilt is otherwise compelling. See discussion, Part V.

Since the evidence about Richey's threats was included in the report of the presentence investigation, it could be considered during sentence deliberations. Such evidence relates to an accused's "history, character, and background." R.C. 2929.04(B). Criminal wrongdoing, even without convictions, is part of an accused's social history and thus properly included in a presentence investigation report. *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895, 914; *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, paragraph one of the syllabus.

II

Presentence Investigation

In Proposition of Law III, Richey argues that the presentence investigation report ("PSI") erroneously included a letter he wrote. The trial court had earlier suppressed that letter as not relevant at the guilt or penalty phase.

While in pretrial custody, Richey wrote to a friend in Scotland that police in the United States did not scare him. The letter was quoted in the PSI as follows:

"If one ever pulls a gun on me he'd better shoot to kill. * * * Remember that day when I shot Gog's in the head with your gun, I laughed so hard I almost ripped my sides! [If the police in Scotland] ever found out about 1/2 the stuff we done they'd bring back the death penalty just for us! * * * If they just give me prison time they better hope to hell I die in there, cause when I get out I won't stop hunting them all down until everyone who is involved in this case is dead!"

Arguably that letter was relevant to the sentencing decision. A PSI is not limited by the strict rules of evidence. See *State v. Greer* (1988), 39 Ohio St.3d 236, 254, 530 N.E.2d 382, 402-403. This PSI related to Richey's "history,

character, and background." R.C. 2929.04(B); *State v. Hutton, supra.*

Moreover, having failed to object to the PSI, or the letter's inclusion in the PSI, Richey waived any issue related to the PSI except for plain error. *State v. Cooey, supra*, 46 Ohio St.3d at 35, 544 N.E.2d at 914; *State v. Long, supra*. No plain error was involved since the court already knew Richey had threatened the prosecutor and the trial witnesses. See Part I. Hence, evidence of these additional threats made little difference and did not cause a miscarriage of justice.

III

Other Evidence Issues

In his fourth proposition of law, Richey argues that his rights to a fair trial and effective counsel were violated when the prosecutor called a defense retained expert as a state witness. Dubois, a consulting engineer, agreed with the State Fire Marshal's opinion that accelerants had been used in the fire.

The right to the effective assistance of counsel includes access to defense experts, and the state's use of such witnesses could infringe an accused's attorney-client privilege. See *Miller v. Dist. Ct. of Denver* (Colo.1987), 737 P.2d 834; *State v. Mingo* (1978), 77 N.J. 576, 392 A.2d 590; but, see, *Noggle v. Marshall* (C.A.6, 1983), 706 F.2d 1408; *Granviel v. Estelle* (C.A.5, 1981), 655 F.2d 673; *State v. Pawlyk* (1990), 115 Wash.2d 457, 800 P.2d 338.

The prosecutor's use of a defense expert does not violate an accused's Sixth Amendment right to counsel. *Noggle, supra*. Although the prosecutor's use of a defense expert may violate an accused's attorney-client privilege, Dubois did not disclose or rely upon any confidential communications here. Instead, Dubois based his testimony upon the physical evidence, reports, and photographs of the fire.

By not objecting, Richey waived any attorney-client privilege as to Dubois. Moreover, no plain error exists; no manifest miscarriage of justice occurred because Dubois's testimony made no difference. The Fire Marshal's testimony that the fire had been caused by arson and accelerants was not otherwise contradicted. In such cases, the record must reflect prejudice before reversal is required. See *Hutchinson v. People* (Colo.1987), 742 P.2d 875, 886; *United States v. Talley* (C.A.9, 1986), 790 F.2d 1468; *State v. Mingo*, 77 N.J. at 588, 392 A.2d at 596.

In Proposition of Law VI, Richey argues that the admission of the Collins carpet into evidence violated his rights because the physical integrity of the carpet had been compromised. Two deputy sheriffs recovered the Collins carpet from a trash dump on July 1, where it had been taken, unknown to investigators, after the fire. Two samples from this carpet revealed the presence of gasoline and paint thinner.

The evidence firmly established that the carpet admitted into evidence was the carpet from the Collins apartment. Authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). The possibility of contamination goes to the weight of the evidence, not its admissibility. "A strict chain of custody is not always required in order for physical evidence to be admissible." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 532, 415 N.E.2d 303, 308; see *State v. Downs* (1977), 51 Ohio St.2d 47, 63, 5 O.O.3d 30, 38, 364 N.E.2d 1140, 1150.

Moreover, other evidence established that the arsonist had used accelerants, including dominant pour patterns to the burning on the wood deck and living room concrete. An accelerant was also found in wood chips from the deck floor. Thus, even if the rug had been wrongfully admitted, other

evidence of arson rendered any error harmless. Crim.R. 52(A).

In Proposition of Law IX, Richey argues that evidence of his pretrial statements violated his *Miranda* rights and Sixth Amendment right to counsel. Richey made several statements to police about the fire, denying any culpability. In one statement, Richey admitted he had broken into a greenhouse across the street and stolen some potted plants. The trial court denied Richey's motion to suppress, finding no constitutional violations.

Richey complains first about admission of a statement he made to Police Chief Miller on the morning of the fire. However, Miller initially interviewed Richey only as a possible witness to the fire, and Richey was not under arrest or in custody. Richey was free to leave as long as he stayed out of the fire fighters' way. Since no custodial interrogation occurred, Miller was not required to inform Richey of his constitutional rights. See *Oregon v. Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409.

Even if a custodial interrogation occurred, any error would be harmless beyond a reasonable doubt. In this brief June 30 statement, Richey said nothing about how the fire started, and the statement could not have harmed him before the trier of fact.

Around noon, Miller interviewed Richey again, but Miller then advised him of his *Miranda* rights before securing a second statement. On July 1, Richey was advised of his rights twice when he was arrested.

Richey further complains that his Sixth Amendment rights were violated by evidence about conversations he had while in pretrial confinement. On August 17, 1986, Richey threatened the prosecutor in a conversation with Deputy

Mike Ball. On November 19, Richey made further threats against the prosecutor and witnesses in a conversation with Deputy Roy Sergeant. In neither case did the deputies initiate the conversation or question Richey.

The *Miranda* safeguards do not preclude admission of this evidence because Richey initiated the conversations and also waived his right to have a lawyer present. Hence, the trial court did not err in declining to suppress Richey's statements. See *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297; *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405; *Connecticut v. Barrett* (1987), 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920.

IV

Prosecutorial Misconduct

In Proposition of Law V, Richey argues that the prosecutor grievously erred in his final guilt-phase argument. However, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87. Accord *State v. DePew* (1988), 38 Ohio St.3d 275, 288, 528 N.E.2d 542, 556-557; *State v. Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642. Moreover, in a bench trial, trial judges are presumed to rely only upon relevant, material, and competent evidence, in arriving at their judgments. *State v. Post, supra*, 32 Ohio St.3d at 384, 513 N.E.2d at 759.

The prosecutor did not commit crucial errors. The prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence. In any event, it was not prejudicial before a panel of judges. *State v. Post, supra*. The prosecutor's varied comments about why accelerants had not shown up on Richey's clothing also

constituted fair comment. Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom. *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 53 O.O.2d 182, 185, 263 N.E.2d 773, 777; see *State v. Byrd* (1987), 32 Ohio St.3d 79, 82, 512 N.E.2d 611, 616.

By referring to Richey's threats, the prosecutor referred to evidence in the record admitted without objection. The prosecutor's reference to the helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial. See *Payne v. Tennessee* (1991), 501 U.S. , 111 S.Ct. 2597, 115 L.Ed.2d 720. Thus, Proposition of Law V is overruled.

V

Sufficiency of Evidence

In Proposition of Law VII, Richey argues that the circumstantial evidence at trial did not establish his identity as the arsonist and killer of Cynthia Collins. Richey argues the evidence is insufficient because testing failed to show accelerants on his clothing. However, Richey may not have spilled any gasoline or paint thinner on his clothing when he set the fire, or at least not on portions of the clothing eventually tested. Alternatively, the fatigues seized by the police on July 1 may not have been those worn by Richey on June 29-30.

Richey challenges the accuracy of the times that Altimus gave for statements she heard. However, Altimus may have been simply confused about when she heard Richey. Richey argues that he could not have set the fire because he was intoxicated and had a splint on his hand. However, he could still use that bandaged hand, and the evidence about his intoxication was conflicting.

In a review for sufficiency, the evidence must be considered in a light most favorable to the prosecution.

*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925, 930. "* * * [T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Murder convictions can rest upon circumstantial evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, 1239; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 27, 514 N.E.2d 394, 402. Indeed, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. *State v. Lott* (1990), 51 Ohio St.3d 160, 167, 555 N.E.2d 293, 302. Accord *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

The evidence against Richey established that he was the killer and arsonist. Five days before the fire, Richey pulled a knife on Butler, who had just been in bed with Candy, and Richey had told Candy he would kill any new boyfriend she found. At the party, Richey was infuriated because Candy brought Nichols, kissed him repeatedly, and asked Nichols to spend the night with her. Dannenberger, Price, and Altimus all heard Richey say that Building "A" would burn that night, which Richey said more than once. The fire started three hours later.

The evidence shows that Hope Collins gave Richey access to her apartment and asked Richey to baby-sit Cynthia, and he agreed to do so. Moreover, Richey admitted to the police that he knew Cynthia was in her bedroom, since he had stopped to see her there during the party. Less than an hour after agreeing to baby-sit for her, Richey started the fire in Hope's apartment. Candy's apartment was immediately below Hope's apartment, and the latter's smoke detector had been ripped out of the ceiling and was hanging by the wires. Damage to the smoke detector may have delayed any warning about the fire.

Unrebutted expert witnesses asserted that the fire had been deliberately started, and that gasoline and paint thinner had been used as accelerants. Richey had access to a greenhouse where gasoline and paint thinner were stored; some of the gasoline and paint thinner could have been missing; and Richey admittedly had stolen plants from that greenhouse. Additionally, during the fire, Richey continued to challenge Nichols to a fight and reasserted to Candy that he would not let anyone else have her. To Altimus, the elderly neighbor, Richey bragged that he had done "a helluva good job" as he laughed and surveyed the fire damage.

The evidence also established Richey's intention to kill Candy and Nichols. Before the fire, Richey threatened Candy and any new boyfriend she would acquire. At the party, Richey specifically threatened to burn Building "A." He then set the fire in a jealous rage directed at Candy and her new boyfriend. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson* (1978), 56 Ohio St.2d 35, 39, 10 O.O.3d 78, 80, 381 N.E.2d 637, 640; *State v. Lott, supra*, 51 Ohio St.3d at 168, 555 N.E.2d at 302.

The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St.3d 322, 332, 530 N.E.2d 1294, 1305. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218, 20 O.O.3d 213, 216, 421 N.E.2d 139, 142.

Other states agree. Aside from a few states whose statutes require a different result, "there is a singular unanimity among the decisions in the overwhelming majority of the states that such a homicide 'partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander.'" *Gladden v. State* (1974), 273 Md. 383, 392, 330 A.2d 176, 181. Accord *State v. Julius* (1991), 185 W.Va. 422, 408 S.E.2d 1, and cases cited in *Gladden* and *Julius*.

In *Wareham v. State* (1874), 25 Ohio St. 601, 607, this court explained the reasons for this principle: "The purpose and malice with which the blow was struck is not changed in any degree by the circumstance that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions."

A verdict will not be reversed "where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St.2d 169, 10 O.O.3d 340, 383 N.E.2d 132, syllabus. In this case, substantial evidence existed to sustain all the elements of the offenses charged, and the panel's verdict stands.

## VI

### Miscellaneous Guilt Phase Issues

In Proposition of Law VIII, Richey argues that the trial court failed to minimize the risk of collusion among witnesses and that, hence, the guilty verdict was not reliable. At the trial, the court granted Richey's motion to separate witnesses in accordance with Evid.R. 615. Richey also asked

that witnesses be sequestered from each other and admonished not to discuss their testimony after they testified. The trial court denied that motion, ruling that possible discussion among witnesses could be tested on cross-examination.

R.C. 2945.03 specifies the right of a trial judge in a criminal trial to control the trial proceedings. Orders relating to witnesses are entrusted to the sound discretion of the trial court.

At trial, Richey failed to demonstrate any need for the measures he requested. Richey could question witnesses during cross-examination about any prior discussions. Richey also fails to cite specific instances of preventable discussions, or any prejudice from the lack of such orders, or any authority requiring such orders. Thus, Proposition of Law VIII lacks merit.

In Proposition of Law X, Richey argues that the trial court erred by not severing count three, the break-in at the K & J Greenhouse, from the other offenses. Richey argues that this offense was not related to the arson. However, the law favors joining multiple offenses in a single trial under Crim.R. 8(A). See *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 20 O.O.3d 313, 315, 421 N.E.2d 1288, 1290. The K & J break-in was an integral part of the arson and thus part of "a common scheme or plan" or "a course of criminal conduct" under Crim.R. 8(A). Richey broke into the K & J Greenhouse, located across the street from the apartment complex, in the hours before the arson. Moreover, the break-in explained Richey's access to gasoline and paint thinner, which other evidence demonstrated were the accelerants used in the arson.

Even though joinder was possible, Richey argues that the trial court should have severed count three from the others

under Crim.R. 14. However, Richey has the burden to establish prejudice to his rights in accordance with Crim.R. 14. *State v. Torres, supra*, syllabus; *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Roberts* (1980), 62 Ohio St.2d 170, 175, 16 O.O.3d 201, 204, 405 N.E.2d 247, 251.

Richey failed to establish prejudice. Evidence of the joined crime, the break-in, was simple and direct and thus not possibly confusing. See *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Franklin* (1991), 62 Ohio St.3d 118, 122, 580 N.E.2d 1, 6. Moreover, the panel of judges could not have confused the separate offenses. *State v. Lott, supra*, 51 Ohio St.3d at 164, 555 N.E.2d at 298.

Additionally, evidence of that break-in would have been admissible, under Evid.R. 404(B), even if that offense had not been joined. Proof that Richey broke into the greenhouse established that he had the opportunity to discover and steal the paint thinner and gasoline stored there. Access to these accelerants was also part of his preparation to burn Building "A." See *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180; *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682, 690. Proposition of Law X lacks merit.

In Proposition of Law XIII, Richey argues that the state's failure to record grand jury testimony violated his due process and fair trial rights, necessitating reversal. Richey correctly points out that "[p]ursuant to Crim.R. 22 grand jury proceedings in felony cases must be recorded." *State v. Grewell* (1989), 45 Ohio St.3d 4, 543 N.E.2d 93, syllabus.

At trial, Richey expressed an interest in grand jury testimony only to avoid unnecessary voir dire of jurors. Richey subsequently waived a jury trial and therefore abandoned this basis for that request. On appeal, Richey asserts for the first time that he needed the transcripts to explore possible inconsistent statements by witnesses.

However, Richey established no basis at trial for any particularized need, and his general assertions do not establish particularized need now. "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists * * *." *State v. Greer* (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

Therefore, Richey was not entitled to the transcripts, even if they existed. The error in failing to record the testimony is harmless. See *State v. Grewell, supra*, 45 Ohio St.3d at 9, 543 N.E.2d at 98; *State v. Wickline* (1990), 50 Ohio St.3d 114, 122, 552 N.E.2d 913, 922.

In Proposition of Law XIV, Richey argues for reversal because the trial court failed to state essential findings under Crim.R. 12(E) when it denied Richey's motions to suppress his pretrial statements. However, Crim.R. 12(E) does not control because Richey did not request factual findings. "[I]n order to invoke the rule, the defendant must request that the court state its essential findings of fact in support of its denial of a motion." *State v. Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701, 718; see *Bryan v. Knapp* (1986), 21 Ohio St.3d 64, 21 OBR 363, 488 N.E.2d 142. Moreover, the evidence necessitated the trial court's decision not to suppress the statements. Any error would be harmless. See Part III.

In Proposition of Law XVI, Richey argues that his rights to a complete record, the effective assistance of counsel, and meaningful appellate review were compromised because the visit to the crime scene was unrecorded. However, the trial court asked counsel before the visit, "Do you have any problem waiving the presence of the court reporter?" The

prosecutor said he did not, and defense counsel said nothing. At trial, neither counsel asked the court to describe the visit.

R.C. 2945.16 authorizes a view of a crime scene, and the trial court is vested with broad discretion in such matters. *State v. Zuern* (1987), 32 Ohio St.3d 56, 58, 512 N.E.2d 585, 588. A view of a crime scene is neither evidence nor a crucial stage in the proceedings. See *State v. Tyler* (1990), 50 Ohio St.3d 24, 38, 553 N.E.2d 576, 593; *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108-109, 54 S.Ct. 330, 333, 78 L.Ed. 674, 679-680. The trial panel must be presumed to know and apply that principle. *State v. Post, supra.* Furthermore, Richey has not supplemented the record, pursuant to App.R. 9(C) or 9(E), in an effort to show prejudice from the lack of recording. The court cannot presume prejudice from an unrecorded visit to a crime scene. *State v. Watson* (1991), 61 Ohio St.3d 1, 15, 572 N.E.2d 97, 109; *State v. Tyler, supra*, 50 Ohio St.3d at 38, 553 N.E.2d at 593.

VII

Ineffective Assistance of Counsel

In Proposition of Law XV, Richey argues that his counsel ineffectively represented him, thereby depriving him of his Sixth Amendment rights. Reversal on this ground requires that the defendant show, first, "that counsel's performance was deficient" and, second, "that the deficient performance prejudiced the defense" so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693.

Richey complains first that his counsel failed to object to evidence about his threats to the prosecutor and witnesses. However, this evidence was arguably admissible and, in any event, made no difference at trial. See Part I. Richey also complains that his counsel did not attempt to disqualify the trial panel. However, counsel's tactical choice not to do so was within the range of professional discretion and cannot be

second-guessed on appeal. His counsel could also properly choose not to object to the presentence report. See *Strickland, supra*, at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

The prosecution's use of the defense's arson expert as a state witness made no difference in view of the uncontradicted evidence of arson and accelerants. Counsel had moved to suppress Richey's pretrial statements, and did not fail in any essential duty by not asking for findings under Crim.R. 12(E), since those statements were properly admitted into evidence. The trial court properly sentenced Richey on different counts; hence, his counsel did not perform deficiently by not objecting to the imposed sentences.

In sum, Richey's counsel continued to function as the "counsel" guaranteed him by the Sixth Amendment. Moreover, no reasonable probability existed "that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The prosecution had a strong case against Richey.

VIII

Constitutionality

We have previously rejected Richey's constitutional challenges in Propositions of Law XX and XXI to Ohio's proportionality review. See *State v. Jenkins* (1984), 15 Ohio St.3d 164, 176, 15 OBR 311, 321, 473 N.E.2d 264, 278; *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXII, Ohio's felony-murder statute is constitutional. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXIII, Ohio's law meets constitutional requirements for death penalty statutes. *State v. Combs* (1991), 62 Ohio St.3d 278, 291, 581 N.E.2d 1071, 1082; *State v. Steffen, supra*, 31

Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768.

## IX

### Sentencing Errors

In Proposition of Law XI, Richey argues that imposing separate sentences for aggravated arson and aggravated murder violates R.C. 2941.25 and constitutional guarantees. In Proposition of Law XII, Richey pursues these same arguments in seeking to overturn separate sentences imposed for aggravated murder and endangering a child.

*State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817, noted:

"This court has set forth a two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import. In the first step, the elements of the two crimes are compared. * * * In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses." (Emphasis *sic.*) See, also, *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 6 OBR 463, 464, 453 N.E.2d 593, 594; *State v. Logan* (1979), 60 Ohio St.2d 126, 128, 14 O.O.3d 373, 374, 397 N.E.2d 1345, 1348.

When the elements are compared, aggravated murder and aggravated arson are not allied offenses of similar import within the meaning of R.C. 2941.25. Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated arson is only one. Moreover, aggravated arson does not require a purposeful killing; instead, it requires a substantial risk of physical harm by fire or explosion. Thus, "[t]he two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by

definition be committed." *State v. Moss* (1982), 69 Ohio St.2d 515, 520, 23 O.O.3d 447, 450, 433 N.E.2d 181, 186. See, also, *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 10 OBR 352, 461 N.E.2d 892; *State v. Willey* (1981), 5 Ohio App.3d 86, 5 OBR 200, 449 N.E.2d 471 (aggravated arson and involuntary manslaughter are separately punishable).

Richey's Proposition of Law XII also lacks merit. Child endangering under R.C. 2919.22(A) and aggravated murder are not allied offenses of similar import. The elements of child endangering are the defendant's custody or control of a child under eighteen and his creation of a substantial risk to the health or safety of the child by violating a duty of care or protection. Aggravated murder is a purposeful killing in the course of one of nine specified felonies, none of which is child endangering. These offenses have entirely different elements. Cf. *State v. Anderson* (1984), 16 Ohio App.3d 251, 16 OBR 275, 475 N.E.2d 492 (child endangering and felonious assault are not allied offenses of similar import).

In Proposition of Law XVII, Richey complains the trial court erred in not giving any weight to relevant mitigation evidence. In Proposition of Law XIX, Richey argues the court of appeals failed to individually consider his particular character and family background.

Richey presented a variety of evidence concerning his personal history, character and background. Also, several mental health professionals concluded that Richey suffered from borderline and antisocial personality disorders. Richey reasons that this evidence was strongly mitigating and that the trial court and court of appeals erred by imposing a death sentence.

Contrary to Richey's claims, courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents. See *Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869,

71 L.Ed.2d 1; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. What weight to be given mitigation evidence is necessarily an individual decision by the fact finder. "* * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen, supra*, paragraph two of the syllabus. See, also, *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus.

At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight. See *State v. Cooey, supra*, 46 Ohio St.3d at 41, 544 N.E.2d at 919; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 889-890.

Richey's Proposition of Law XIX also lacks merit. The court of appeals did not err when it referred to millions of persons with backgrounds similar to Richey's. By so doing, the court simply reflected its view that his family background was not mitigating. We have used similar reasoning. See *State v. Dickerson* (1989), 45 Ohio St.3d 206, 218, 543 N.E.2d 1250, 1261; *State v. Broom, supra*, 40 Ohio St.3d at 294, 533 N.E.2d at 701.

The court of appeals' written opinion demonstrates that the court performed its constitutional obligation of giving "individualized consideration" to the appropriate penalty for Richey. *Lockett v. Ohio* (1978), 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990; *Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1. Moreover, our independent evaluation of the evidence cures any sentencing errors by the trial court or the court of appeals. See *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *State v. Lott, supra; State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710.

X

Sentence Evaluation

In Proposition of Law XVIII, Richey argues that his death sentence was inappropriate based upon residual doubt, the admission of irrelevant evidence of threats, and overwhelming mitigation evidence. Richey does not dispute, and we find, that the aggravating circumstance, that the murder occurred during an aggravated arson, was proved beyond a reasonable doubt.

Richey presented extensive mitigating evidence that he suffered "borderline" and "antisocial" personality disorders. According to Dr. Leena Puhakka, a psychologist, Richey displayed classic symptoms of those personality disorders. Dr. Puhakka found Richey functioned at the emotional level of a ten- or eleven-year-old. Dr. Antoine Demosthene, a psychiatrist, found no evidence of psychosis or mental disease, although Richey was very socially maladjusted, and suffered antisocial personality disorder.

Dr. William McIntosh, a psychologist, testified that Richey frequently lied to manipulate the results of mental evaluations. He stated that Richey had come from a chaotic family background, had an early history of violence and drug abuse, and displayed erratic behavior and poor impulse control. Although not psychotic, Richey did have mental disorders, according to Dr. McIntosh.

Dr. Thomas Sherman, a board-certified psychiatrist testifying by deposition for the state, found Richey "extremely impulsive, self-centered, hedonistic." He stated that Richey did not display any psychosis or inability to understand the criminality of his acts or to refrain from those acts.

Evidence by psychiatrists and psychologists also revealed Richey's preoccupation with death, blood, and violence, and

his acts of self-mutilation and attempts at suicide resulting in over six hundred self-imposed scars and cuts on his body. Richey received his first mental health evaluation in January 1978, when thirteen years old, and has been briefly treated and evaluated for erratic behavior in various mental institutions.

Social worker Judith Tolliver described Richey as a blustering young man who suffered from a "histrionic behavior disorder" in addition to his other personality disorders. She found Richey not delusional, mentally impaired or actively psychotic but severely and chronically maladjusted.

Richey was born in Holland in August 1964, where his father was stationed as a member of the United States Armed Forces. His mother was Scottish. Richey was raised mostly in Scotland, where his parents lived. As a teenage boy in Scotland, Richey was arrested several times for fighting, larceny, and breaking and entering. Richey came to the United States in 1982 and worked for his father, and he also travelled to different cities and worked at different jobs. In 1984, Richey joined the Marine Corps, and he served for fourteen months before being honorably discharged. Richey also was married in Minnesota and fathered a son, but afterwards his wife divorced him.

Our independent assessment of the evidence reveals some mitigating features in Richey's history and background. Richey's mother abused alcohol and taught him to resent authority. Richey suffers from lifelong borderline and antisocial personality disorders. Richey also served more than a year in the United States Marine Corps and was honorably discharged. All of these factors are entitled to some mitigating weight. Otherwise, little else in Richey's history, character, or background is mitigating. Although Richey abused alcohol and drugs, nothing suggests a serious

drug addiction. On balance, his history, character and background do not offer substantial mitigating features.

Nothing in the nature and circumstances of the offense offers any mitigating features. Richey killed a defenseless child, whose safety had been entrusted to him, as a result of a blind, jealous rage directed at his exgirlfriend and her current lover. The fact that he killed an unintended victim rather than the intended victims does not alter his moral culpability under the firmly established doctrine of transferred intent. *State v. Solomon; Wareham v. State*, both *supra*. His ostensible efforts to save Cynthia did not help her and interfered with firemen's efforts to rescue her and fight the fire. Under the circumstances, nothing in the facts of the offense is mitigating.

The murder victim did not induce or facilitate the offense nor was Richey under "duress, coercion, or strong provocation"; hence, R.C. 2929.04(B)(1) and (B)(2) do not apply. Richey did not suffer, at the time of the offense, from a "mental disease or defect"; therefore, R.C. 2929.04(B)(3) did not apply. A behavior or personality disorder does not qualify as a mental defect or disease. *State v. Cooey; State v. Van Hook, supra*. Richey's age of twenty-one when he committed the offenses is a relevant statutory mitigating factor entitled to weight under R.C. 2929.04(B)(4). Richey's prior adjudications as a juvenile offender and his adult record of arrests and convictions preclude finding the lack of a record as a mitigating factor. See R.C. 2929.04(B)(5). The evidence shows that Richey was the only actor in these crimes; hence, R.C. 2929.04(B)(6) does not apply.

Richey suggests residual doubt as an "other factor," R.C. 2929.04(B)(7). Depending upon the facts, residual doubt can be a mitigating factor. *State v. Watson, supra*. However, the strong evidence of guilt in this case precludes awarding residual doubt any mitigating value.

Richey also argues that the admission of irrelevant evidence that he threatened the prosecutor and witnesses showed the unfairness of the trial and rendered the death penalty inappropriate. However, such evidence related to his "history, character, and background," R.C. 2929.04(B), and thus was relevant to the death penalty determination. Richey's background and his personality disorders are relevant under R.C. 2929.04(B)(7), but their impact has already been considered as part of his background and history. No other mitigation appears relevant as "other factors" under R.C. 2929.04(B)(7).

Despite this mitigation evidence, the aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.

The death penalty is appropriate and proportionate when compared with similar felony murder cases. See *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State v. Lott, supra* (felony murder, victim set on fire); *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408 (felony murder); *State v. Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State v. DePew, supra* (felony murder including arson, three victims including a seven-year-old); *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old

victim); *State v. Maurer, supra* (felony murder, seven-year-old victim).

Accordingly, we affirm the convictions and sentence, including the death penalty.

*Judgment affirmed.*

Holmes, Douglas and Resnick, JJ., concur.

Sweeney, Wright and H. Brown, JJ., dissent.

Herbert R. Brown, J.

I must respectfully dissent. For the reasons set forth below, I would overturn the sentence of death.

R.C. 2929.05 requires us to undertake a three-part analysis: the court must review proposed errors, weigh aggravating circumstances against mitigating factors, and compare the sentence to those imposed in similar cases. I disagree with all three parts of the majority's analysis.

I

Mitigation

The majority asserts that "[n]othing in the nature and circumstances of the offense offers any mitigating features." This statement is shocking, in view of the fact that Richey actively tried to save Cynthia Collins. His efforts were not "ostensible," as characterized by the majority; Richey put his own life in danger by physically being in the burning apartment. He repeatedly and hysterically told the firemen and anyone else nearby: "there's a baby in there." He also told the firemen where Cynthia was in the apartment. The majority cruelly misconstrues the evidence when it asserts that the defendant's efforts interfered with those of the firemen. The defendant was overwrought in his concern for the child. While there is some evidence that his presence

(because he was overwrought) was not helpful, this is in no sense contradictory to the fact that defendant's desire was to save the child. Further, the officials clearly identified in the record as physically restraining Richey and keeping him away from the apartment were special deputies and a police officer in civilian clothing. These people would not and could not have directly fought the fire or rescued Cynthia.

In addition, no evidence of any animus toward Cynthia was presented. In fact, the prosecutor admitted in oral argument before this court that there was no evidence that Richey had any intent to kill Cynthia. Chief of Police Miller testified that Richey was concerned about Cynthia, and special agent Chandler testified that Richey repeatedly asked about Cynthia while the fire was being put out. Richey's rescue attempt and the fact that the victim was unintended are strong mitigating factors that should have been considered in this case. When these factors are considered, the balance shifts against the death penalty.

II

Claims of Error

The majority dismisses several of the defendant's propositions of law without real analysis of the issues.

A

Evidence of Threats

Several of defendant's propositions of law deal with evidence that he made threats against the prosecutor and potential witnesses while in custody. The majority first contends that the issue of admissibility of these threats is waived. Richey did move to suppress the statements, and the fact that he did not specifically object to their admissibility does not automatically mean they are waived. "* * * [A]n appellate court need not consider an error which a party complaining of the trial court's judgment could have called,

but did not call, to the trial court's attention at a time when such error could have been avoided * * *." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367. Richey brought this error to the trial court's attention by the motion to suppress, and thus there is no waiver. See, generally, *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

The majority also contends that Richey's threats "reflect a consciousness of his guilt," and should therefore be admissible. It is by no means clear that this is so. A person wrongly accused could easily take out his frustration and anger in this fashion. In particular, Richey's anti-social and borderline personality traits might make the urge to lash out from a false accusation stronger. In any case, jailhouse threats are of a different order than flight from prosecution or a coverup as evidence of guilt.

The threats made by Richey are, pure and simple, acts separate and distinct from the one for which he was being tried. Proof of such threats can be admitted during the guilt phase only to show motive, opportunity, intent, plan, and so forth. (Evid.R. 404[B].) As the threats came after the events for which Richey was being tried, none of these factors can possibly be proved by evidence of later threats. Therefore the evidence is inadmissible for the guilt phase of trial, and it was error for the trial court to admit it.

Nor should evidence of the threats have been used in the sentence deliberations. The majority contends that this evidence is part of his "history, character, and background" and that any criminal wrongdoing is properly included in a presentence report. The cases cited for this proposition are easily distinguishable from the present situation. In *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, the presentence investigation report included under the heading "Prior Criminal Record" allegations for which the defendant

had never been tried. The majority in that case held that the statements were permissible in the presentence report under "social history" of the defendant. The incidents referred to were a violent assault and a sexual assault on a small child, not jailhouse threats. In *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, it was the defendant's arrest record that was at issue. A defendant's arrest record is part of his "prior criminal record," and thus can be included in a presentence report. *Id.* at 43, 559 N.E.2d at 441. Richey's threats were not part of a "prior criminal record," as they occurred after the events for which he is being tried, and he has never been charged or convicted of anything stemming from the threats.

Evidence of Richey's threats relates to his history, character or background in only the most marginal way. Its prejudicial impact is clear from the court's own actions; the judges thought Richey so dangerous that they had him shackled during the trial and allowed deputies to carry firearms and search people entering the courtroom. Considering these factors, evidence of the threats was not properly used either in the guilt phase or in sentence deliberations.

B

Letter

While in pretrial custody, Richey wrote a letter to a friend in Scotland. The trial court originally suppressed the letter as irrelevant to either the guilt or penalty phase. The letter was later included in the presentence report.

The majority contends that "[a]rguably that letter was relevant to the sentencing decision." I fail to see how it could have been relevant. The letter is simply a written version of the same threats Richey made verbally, n1 as well as more "other acts" evidence about events in Scotland which occurred years earlier. The letter is highly prejudicial, in particular Richey's reference to bringing back the death

penalty in Scotland. The same objections made above to the admissibility of the verbal threats apply here. The letter is not part of a prior criminal record, and any relation to Richey's history, character and background is tenuous at best. This, together with its highly prejudicial nature, should have made the letter inadmissible in the sentencing deliberations.

> n1 The threats in the letter were not even directed toward the parties threatened, but were more in the nature of boasts to Richey's friend in Scotland.

In addition, Richey's objection to the letter was not waived. Error as to the letter had been brought to the trial court's attention in the original motion to suppress. It was prejudicial error for the trial court to have admitted the letter in the presentence report. n2

> n2 "* * * The report should include only such information as is directly relevant to the aggravating and mitigating circumstances. * * *" *State v. Glenn* (1986), 28 Ohio St.3d 451, 28 OBR 501, 504 N.E.2d 701, paragraph two of the syllabus.

III

Proportionality of the Death Penalty

Besides reviewing the claims of error and weighing aggravating circumstances against mitigating factors, we must decide whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. It is this last part of the analysis which most clearly reveals how inappropriate the death penalty is in this case.

Several cases are cited by the majority to show the proportionality of the death penalty in this case. However, if one reads those cases (which are merely listed and not analyzed by the majority), it is obvious that not one is remotely similar to this one. The defendant in *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082, shot the victim at close range and then beat him. In *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293, the victim was directly doused with lamp oil and set on fire. In *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408, the defendant had been roaming a bar and threatening patrons with a loaded gun. The victim refused to lie down when ordered, and defendant shot him in the back. In *State v. Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191, the defendant kidnapped a seven-year-old girl intending to rape her. He partially asphyxiated her and threw her out a fourth-story window. Although arson is involved in *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, the victims all died of multiple stab wounds inflicted before the fire was started. In *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267, a twelve-year-old boy was savagely beaten to death in revenge for something his brother had done. The victim in *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, had been kidnapped, sexually assaulted and strangled. The victim in *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, had been kidnapped, sexually assaulted and shot. In each case, the defendant had clear animus toward the victim, or harmed the victim in a direct, face-to-face encounter, or both.

Cases of transferred intent where the death penalty was imposed also involve face-to-face violent encounters between victim and defendant. For example, in *State v. Sowell* (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294, defendant forced his way into the apartment where his intended victim was a

guest. Rather than be escorted outside by the person who opened the door, defendant shot him in the head.

I find no case in Ohio where a defendant in a felony murder case has been put to death unless he had specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both. n3 As discussed above, there is no evidence that Richey had specific animus towards Cynthia Collins. On the contrary, he showed concern for her life while the fire was in progress. Even if the defendant's intent can be inferred from the circumstances, or transferred from the animus shown towards others, the circumstances involve no specific animus or face-to-face violent encounter. There is a stunning difference between this case and those cited as comparable by the majority.

n3 The facts in the case of *State v. Thompson* (1977), 55 Ohio App.2d 17, 9 O.O.3d 190, 379 N.E.2d 245, are similar to those in this case. Firemen died as a result of fighting an arson fire in a restaurant. The court of appeals found that the trial judges were justified in finding intent from the act of arson, plus defendants' knowledge that others were actually exposed to the danger they created. The case was never reviewed by this court, nor was the death penalty imposed. I believe that it reaches too far to find intent to kill a fireman from the act of arson and the knowledge of danger alone. If this were the rule, any time someone dies in an arson fire the defendant would be guilty of aggravated murder. This essentially abrogates the longstanding Ohio rule that specific intent is needed for aggravated murder, and would render it no different from felony murder in other states.

Under the Eighth and Fourteenth Amendments to the United States Constitution, as well as R.C. 2929.05, we are obligated to perform a *meaningful* proportionality review of the death penalty in every case. See *Gregg v. Georgia* (1976), 428 U.S. 153, 173, 187, 204-206, 223-224, 96 S.Ct. 2909, 2925, 2931-2932, 2939-2940, 2948-2949, 49 L.Ed.2d 859, 875, 882, 892-893, 902-903; see, also, *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. Such a review deserves more than lip service and a listing of cases which are in no sense comparable to this one. There has been no meaningful proportionality review in this case. The death penalty is not warranted, and I must dissent.

Sweeney and Wright, JJ., concur in the foregoing dissenting opinion.

**APPENDIX G**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KENNETH RICHEY,

DEFENDANT-APPELLANT

Case No. 12-87-2

Court of Appeals of Ohio,
Third Appellate District,
Putnam County

December 28, 1989, Decided

MR. RANDALL M. DANA, Ohio Public Defender, MS. JANE PERRY, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, For Appellee.

SHAW, J., EVANS, P.J. and BRYANT, J., concur.

OPINION

SHAW, J. This is an appeal by the defendant, Kenneth T. Richey, from a judgment of conviction and sentence of death rendered in the Common Pleas Court of Putnam County, Ohio for aggravated arson, breaking and entering, child endangering, and the aggravated murder of Cynthia Collins.

On June 30, 1986, at approximately 4:15 A.M., a fire was discovered in the apartment of cope Collins, located in the Old Farm Village Apartment complex in Columbus Grove,

Putnam County, Ohio. The only person in the apartment was Ms. Collins' daughter, two year old Cynthia Collins, who died as a result of the fire.

On July 10, 1986, the defendant was indicted by the Putnam County Grand Jury on one count of aggravated murder with the specification that the offense was committed during the commission of an aggravated arson. The Putnam County Grand Jury also indicted the defendant for aggravated arson, breaking and entering, involuntary manslaughter and child endangering.

On July 14, 1986, the defendant pled not guilty and not guilty by reason of insanity to all counts in the indictment and the specification. On December 12, 1986, the defendant withdrew his plea of not guilty by reason of insanity and waived his right to a trial by a jury.

On January 5, 1987, trial to a three judge panel commenced. On January 8, 1987, the panel returned its verdict finding the defendant guilty of aggravated murder and the death penalty specification. The defendant was also found guilty of aggravated arson, breaking and entering, and child endangering. The court dismissed the involuntary manslaughter charge finding it to be a lesser included offense.

After one continuance, the penalty phase of the trial began on January 26, 1987. On that same day, the three judge panel sentenced the defendant to death for the aggravated murder of Cynthia Collins and imposed consecutive sentences on the remaining charges. The decision of the court was journalized on February 2, 1987, and the opinion of the trial court was filed on February 9, 1987. The defendant filed his notice of appeal in this court on March 10, 1987.

The brief filed by the defendant contains twenty-two assignments of error. We shall review each assignment in the order in which it was argued.

1. "Ohio's multiple counts statute, R.C. 2941.25 was violated when appellant was sentenced for both aggravated murder and aggravated arson, thereby denying appellant his statutory and constitutional Double Jeopardy and Due Process Protections."

The defendant contends that aggravated murder, as defined in R.C. 2903.01(B), and aggravated arson, as defined in R.C. 2909.02(A), are allied offenses of similar import within the contemplation of R.C. 2941.25 because the crimes were committed incidentally to each other. Therefore, the defendant argues, he cannot be convicted for both crimes under R.C. 2941.25(A).

R.C. 2941.25 provides that:

(A) "Where the same conduct by defendant can be construed to constitute two or more offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) "Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment may contain counts for all such offenses and the defendant may be convicted of them all."

In State v. Moss (1982), 69 Ohio St. 2d 515, 519, the Ohio Supreme Court held R.C. 2941.25 "* * * has authorized trial courts, in a single criminal proceeding, to convict and sentence a defendant for two or more offenses, having as their genesis the same criminal conduct or transaction, provided that the offenses were not (1) allied and of similar import, (2) were committed separately or (3) were committed with a separate animus as to each offense."

In determining whether the defendant's conviction for aggravated murder and aggravated arson violates R.C. 2941.25 we are guided by principles set forth in State v. Donald (1979), 57 Ohio St. 2d 73 and State v. Logan (1979), 60 Ohio St. 2d 126 wherein the Supreme Court of Ohio recognized that in order for two crimes to constitute allied offenses, the crimes and their elements must correspond to such a degree that the commission of one offense will result in the commission of the other offense.

The elements of aggravated murder under R.C. 2903.01(B) are:

(1) Purposely causing another's death.

(2) While committing * * *

(3) Kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary or escape.

The elements of aggravated arson under R.C. 2909.02(A)(1) are:

(1) Knowingly

(2) Create a substantial risk of serious physical harm to any person.

(3) By means of fire

Having reviewed these elements, we are of the opinion that the crimes of aggravated murder and aggravated arson are not allied offenses of similar import. Accord State v. Hayes (Sept. 23, 1981) Hamilton App. No. C-800 805, unreported.

R.C. 2903.01(B), by its nature, requires a purpose to cause the death of another while engaged in one of nine

felonies. R.C. 2909.02(A)(1) requires, by its nature, a fire and knowingly creating a substantial risk of serious physical harm to any person. The two criminal offenses are not, by their very nature, committed for the same purpose.

Moreover, the commission of aggravated murder does not require arson as the underlying felony in the felony murder subsection; it may be any of nine felonies. Likewise, the commission of aggravated arson need not result in aggravated murder. Clearly, the crimes and their elements do not correspond to such a degree that commission of one offense constitutes commission of the other, nor is the commission of one merely incidental to the other. Thus, the trial court acted within the sentencing authority of R.C. 2941.25(B) when it sentenced the defendant on the convictions for aggravated arson and aggravated murder.

The defendant also contends that his convictions for both aggravated murder and aggravated arson violate the Double Jeopardy Clause. It is well established that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits multiple punishments for the same offense. North Carolina v. Pearce (1969), 395 U.S. 711.

In Blockberger v. U.S. (1932), 284 U.S. 299, 304. The United States Supreme Court established the following test for determining whether two offenses are sufficiently distinguishable to constitutionally permit the imposition of cumulative punishment:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Clearly, R.C. 2903.01(B) and 2909.02(A)(1) each require proof of a fact that the other does not.

"A felony murder rising to the level of R.C. 2903.01(B) requires proof of the death of another while committing or attempting to commit any of nine listed offenses, only one of which is aggravated arson. Aggravated arson, on the other hand, requires no proof of death, but only of substantial risk of serious physical harm to another." State v. Hayes, supra, at page 5.

Thus, we conclude that, in the case sub judice, the imposition of cumulative punishment did not violate the Double Jeopardy Clause. Accordingly, the defendant's first assignment of error is not well taken.

2. "Ohio's multiple count statute, R.C. 2941.25, was violated when appellant was sentenced for both aggravated murder and child endangering, thereby denying appellant his statutory and constitutional Double Jeopardy and Due Process protections."

The defendant, under this assignment of error, makes an identical argument to that in the preceding assignment of error, except that he now contends that convictions for aggravated murder, as defined in R.C. 2902.01(B), and child endangering, as defined in R.C. 2919.22(A), are precluded under R.C. 2941.25. Having previously set forth the Donald-Logan test used in the application of R.C. 2941.25, we now proceed directly to a determination of the merits of the defendant's claim.

The elements of child endangering under R.C. 2919.22(A) are:

(1) Person having custody or control of a child under 18 * * *

(2) Did create a substantial risk to the health and safety of the child * * *

(3) Resulting in physical harm to the child.

Having compared the elements of child endangering to those elements of aggravated murder under R.C. 2903.01(B), we are of the opinion that the two crimes are not allied offenses of similar import.

R.C. 2903.01(B), by its nature, requires a purpose to cause the death of another while engaged in any of nine felonies, none of which is child endangering. R.C. 2919.22(A), by its nature, requires only the creation of a substantial risk to the safety or health of a child in the offender's custody which results in physical harm to the child. The requisite culpability and proof necessary to establish each offense is therefore entirely different.

Moreover, one of the elements of R.C. 2919.22(A) is that a person be under the custody or control of the defendant. Therefore unless the child is under the custody or control of the defendant, a child endangering charge cannot be sustained. As custody and control is not a necessary finding for an aggravated murder charge, child endangering clearly requires proof of an additional element. Thus, it cannot be said that the elements of child endangering and aggravated murder correspond to such a degree that commission of the latter offense will result in the commission of the former offense. We therefore conclude that the trial court acted within the sentencing authority of R.C. 2941.25(B) when it sentenced the defendant on the convictions for aggravated murder and child endangering.

The defendant, under this assignment of error, also contends that his convictions for aggravated murder and child endangering, violate the Double Jeopardy Clause.

Clearly, R.C. 2903.01(B) and 2919.22(A) each require proof of an additional fact which the other does not. See, Blockberger v. U.S., supra. A felony murder rising to the level of R.C. 2903.01(B) requires proof of the death of

another while committing or attempting to commit any of nine listed offenses. Child endangering, on the other hand, requires no proof of death, but does require, unlike R.C. 2903.01(B), that the victim be in the custody or control of tie defendant.

Thus, we conclude that the imposition of multiple punishment did not violate the Double Jeopardy Clause. Accordingly, the defendant's second assignment of error is not well taken.

3. "A death sentence based upon a sole aggravating circumstance which merely duplicates an element of the underlying crime is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The Ohio Supreme Court, in State v. Poindexter (1988), 36 Ohio St. 3d 1, paragraph one of the syllabus, certiorari denied (1988), U.S. , 109 S. Ct. 272, stated:

"When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case."

This assignment of error was addressed and rejected in State v. Jenkins (1984), 15 Ohio St. 3d 164, certiorari denied (1985), 472 U.S. 1032, rehearing denied (1985), 473 U.S. 973; and State v. Byrd (1987), 32 Ohio St. 3d 79, certiorari denied (1988), U.S. , 108 S. Ct. 763, rehearing denied (1988), U.S. , 108 S. Ct. 1252. Accordingly, the defendant's third assignment of error is not well taken.

4. "The state's circumstantial evidence was insufficient, as a matter of law, to prove every essential element of the capital crime with which he was charged. Because appellant's capital conviction was based on insufficient evidence, he was

deprived of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I, of the Ohio Constitution, and his conviction must be vacated.

5. "Appellant's conviction of this capital offense was against the manifest weight of the evidence. In the interests of justice, that conviction must be reversed."

The defendant first contends that his conviction for aggravated murder was based entirely upon circumstantial evidence and, as such, the evidence did not rebut alternative theories supporting his innocence. The defendant rests his argument primarily upon the syllabus of State v. Kulig (1974), 37 Ohio St. 2d 157, which states as follows:

"Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt."

In State v. Williams (1976), 47 Ohio App. 2d 330, 336, this court, relying upon State v. Sheppard (1956), 165 Ohio St. 293, paragraph 6 of the syllabus, concluded that the determination required under the syllabus of State v. Kulig, supra, was clearly a factual question for the jury.

Two years after our decision in State v. Williams, supra, the Supreme Court of Ohio confirmed our conclusion that the determination that the circumstantial evidence is irreconcilable with any reasonable theory of an accused's innocence is a factual question for the jury. See, State v. Gravens (1978), 54 Ohio St. 2d 114, 118. Accordingly, in a case where circumstantial evidence is relied upon, once the trier-of-fact has reached its decision, "* * * an appellate court * * * will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence." State v. Gravens, supra, at p. 119.

The fare that caused the death of Cynthia Collins was discovered on June 30, 1986, at approximately 4:15 A.M. The record in this case establishes that throughout the evening of June 29, 1986 and the early morning hours of June 30, 1986, the defendant and several residents of the Old Farm Village Apartments attended a party at the apartment complex. Among those individuals attending the party, was Candy Barchett, who was a resident of Unit A of the apartment complex.

Several days prior to the fire, Ms. Barchett had broken off a short but rather intense relationship with the defendant. On the night of June 29, 1986, Ms. Barchett attended the party with her new boyfriend, Mike Nichols. Upon leaving the party, Barchett did so in company of Nichols and retired with him to her apartment in Unit A.

Ms. Barchett testified that during the course of her relationship with the defendant, he had warned her that he would kill any other man that she got involved with. Three witnesses, who attended the party at the Old Farm Village Apartments, testified that during the evening of June 29, 1986, the defendant stated his intent to burn down Unit A of the apartment complex. All three of the witnesses agreed that, when the defendant made the statement, he was angry, and at least one of the witnesses attributed the defendant's anger to Ms. Barchett's presence with Nichols.

At approximately 3:00 A.M. on June 30, 1986, after the pay had broken up, several men arrived at the apartment complex and asked Hope Collins to go for a ride. Hope Collins testified that she agreed to leave with the men and that she then asked the defendant to babysit for her daughter, Cynthia, who was asleep in the Collins' apartment located on the second floor, directly above Ms. Barchett's apartment in Unit A.

As Hope Collins drove away with her friends, she saw the defendant head up the steps toward the door of her apartment. Approximately 30 to 35 minutes later, the fire in the Collins' apartment was discovered.

The defendant was the first person to the scene of the fire. Upon arrival at the scene, firefighters and law enforcement officials saw the defendant standing at the door attempting to enter the burning apartment. The defendant was yelling that a child was in the apartment.

Juanita Altimus, an elderly resident of the apartment complex, testified that subsequent to the fire, the defendant stated to her "it looks like I did a helluva good job, didn't I."

Ms. Altimus admitted that she was not entirely certain of the date and place that the statement was made and that her testimony at trial conflicted with earlier statements to the police in this regard. However, the witness testified with certainty that the statement was in fact made by the defendant.

In addition to the foregoing testimony, the state produced the defendant's taped statement to Assistant State Fire Marshall Robert Cryer admitting that on the night of the fire, he had broken into the K&J Greenhouse, located across the street from the apartment complex, and stolen some plants. The owner of the greenhouse testified that both paint thinner and gasoline were stored in his business, and were accessible to anyone on the premises.

The state also produced samples of wood chips taken from the porch of the Collins' apartment, and samples from the carpet inside the apartment. Assistant State Fire Marshall Cryer testified that laboratory tests detected traces of paint thinner and gasoline in the samples and he, therefore, concluded that the fire was an arson.

Cryer also testified that burn or pour patterns on the cement floor beneath the carpet and on the wooden porch also led him to conclude that the fire was arson related. In addition, Gregory DuBois, an independently retained consulting engineer, testified that he concurred in Cryer's conclusion that accelerants were used to ignite the fire.

Taking all the evidence in this case and considering the authority set forth above, we cannot say that the evidence, albeit circumstantial, was insufficient as a matter of law to enable the three judge panel, as the trier of fact, to exclude a reasonable hypothesis of innocence. State v. Graven, supra.

The defendant cites several aspects of the state's case as being "vague, uncertain, conflicting, and fragmentary" to support his argument that the verdict was against the weight of the evidence. However, having reviewed the entire record, we conclude that there was sufficient evidence for the trier of fact to find the defendant guilty beyond a reasonable doubt, and therefore we will not reverse the verdict as being against the weight of the evidence. See State v. Brown (1988), 38 Ohio St. 3d 305. Accordingly, the defendant's assignments of error four and five are not well taken.

6. "The trial court erred when it permitted the Assistant State Fire Marshall to testify as to two exhibits which the State failed to prove the chain of custody. The court further erred when it permitted those exhibits to be admitted into evidence, in violation of Appellant Richey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution."

The exhibits in question were samples taken from the carpet which was inside the Collins' apartment at the time of the fire. At some point subsequent to the fire, the carpet was removed from the apartment by the manager of the complex and was taken to a dump site. Members of the Putnam

County Sheriff's Department retrieved the carpet from the dump site on July 1, 1986, approximately 36 hours after the fire had occurred. Samples from the carpet were taken two or three weeks later and laboratory tests revealed traces of paint thinner and gasoline in the samples. In the course of obtaining the samples, the carpet was laid out in the sheriff's department parking lot.

Based on the foregoing events, the defendant argues that the exhibits were not properly authenticated or identified, because the State failed to establish a continuous chain of custody of the carpet and also failed to establish that the carpet was not tainted by having been left at the dump site, or laid out on the sheriff's department parking lot.

"* * * Although the State bears the burden of establishing a proper chain of custody, that duty is not absolute. State v. Moore (1973), 47 Ohio App. 2d 181, * * *. The State need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur. Id. Moreover, breaks in the chain of custody go not to the admissibility of evidence, but to the weight afforded it. [Citations omitted.]". State v. Blevins (1987), 36 Ohio App. 3d 147, 150, motion for leave to appeal overruled (June 10, 1987), No. 87-524.

Here, the carpet samples offered at trial, and about which testimony was offered, were sufficiently identified as having been taken from the carpet that was inside the Collins' apartment at the time of the fire. Deputy Sheriff Todd Pingle testified that he retrieved the carpet from the dump site less than 36 hours after the fire. There was no question that the carpet so retrieved was in fact the same carpet that was inside the Collins' apartment. Subsequently, the carpet remained in the possession of the sheriff's department until the Assistant State Fire Marshall took his samples. The samples were sealed in a can and delivered to the Ohio Arson Crime Lab to determine the presence of accelerants.

We conclude that sufficient foundational evidence was offered by the state to support a finding that the primary evidence was what its proponent claimed it to be. Evid. R. 901(A). That there was a break in the chain of custody that could have possibly resulted in contamination of the carpet goes to the weight rather than the admissibility of the exhibits.

Moreover, any possible contamination of the carpet, by having been laid on the sheriff's department parking lot, likewise goes to the weight to be accorded the evidence, rather than its admissibility. Accordingly, the defendant's sixth assignment or error is not well taken.

7. "The sentence of death imposed on Appellant Richey was unreliable and inappropriate. The death sentence in appellant's case violates the Eighth and Fourteenth Amendments to the United States Constitution, and Sections 9 and 16, Article I, of the Ohio Constitution."

The defendant first contends that his conviction and sentence of death was unreliable because of error in the admission of evidence that occurred during the guilt phase of the trial and also because of the circumstantial nature of the state's case.

R.C. 2929.05(A) requires this court to review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances by the panel of three judges. Inasmuch as this assignment of error raises the issue of the sufficiency of the evidence to support the finding of the aggravating circumstance, we will address the defendant's specific arguments and also conduct the review of the evidence required by R.C. 2929.05(A).

In conducting our review, we first address the defendant's argument that his conviction was unreliable because of testimony by two deputy sheriffs regarding the

defendant's threats on the life of the prosecutor and a past attempt on the life of his own father. The defendant contends that the sole purpose of this testimony was to improperly show his propensity for crime.

We first note that defense counsel failed to raise any objection during the trial to the testimony in question. Failure to object to an alleged error at the time of trial constitutes a waiver of the claim of error absent a showing of plain error. See, State v. Wade (1978), 53 Ohio St. 2d 182. Pursuant to our findings under defendant's fifteenth assignment of error, which is identical to the issue discussed herein, we find no plain error.

Moreover, we must indulge in the usual presumption that, in a bench trial in a criminal case, the court considered only the relevant, material and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. See, State v. Post (1987), 32 Ohio St. 3d 380, certiorari denied (1988), U.S. , 108 S. Ct. 1061, rehearing denied (1988), U.S. , 108 S. Ct. 1492. Thus, we are not persuaded that the testimony in question undermined the reliability of the defendant's conviction.

We turn now to a review of the evidence to determine whether it supports the finding of the aggravating circumstance by the three judge panel.

In this case, the defendant was charged with one aggravating circumstance in his indictment as follows:

"Count One On or about June 30, 1986 one Kenneth Richey did purposely cause the death of another, to wit: Cynthia Collins, while committing or attempting to commit, or while fleeing immediately after committing, or attempting to commit, aggravated arsón under Revised Code Section 2909.07(A)(1) with the following specifications.

"Specification to Count One. The grand jurors further find and specify that pursuant to Ohio Revised Code Section 2929.04(A)(7) the offense was committed while Kenneth Richey was committing, attempting to commit, or fleeing immediately after committing aggravated arson in violation of Ohio Revised Code Section 2909.02(A)(1) and Kenneth Richey being the principal offender in the commission of the aggravated murder and that offense is punishable by death or imprisonment for life in violation of Ohio Revised Code Section 2903.01(B)."

We find that the evidence in the record supports the finding of the aggravating circumstance beyond a reasonable doubt.

As noted earlier, under Assignment of Error Nos. 4 and 5, the evidence in this case reveals that, several days before the fire which claimed the life of Cynthia Collins, the defendant had been jilted by his girlfriend, Candy Barchett. During the course of his brief relationship with Barchett, the defendant had warned Barchett that he would kill any other man that she became involved with.

On June 29, 1986, the evening preceding the fire, the defendant, Candy Barchett and Ms. Barchett's new boyfriend, Mike Nichols, along with several other people, attended a gathering at the Old Farm Village Apartments, where both the defendant and Barchett resided. Ms. Barchett lived in Unit A of the complex directly above the apartment of Hope Collins.

At some point during the party, the defendant became angry and stated that Unit A would burn or would be blown up. One witness to the statement testified that the defendant was upset by Ms. Barchett's presence at the party with Nichols.

At approximately 3:30 A.M. on June 30, 1986, Hope Collins left the apartment complex with Dennis Smith and

Todd Ellerbrock. Hope Collins and Dennis Smith testified that the defendant agreed to babysit Cynthia Collins in her mother's absence. The defendant was the last person seen going toward the Collins' apartment before the fire.

The defendant was also the first person on the scene of the fire. The defendant attempted to enter the burning apartment and yelled that a child was inside the unit. Cynthia Collins was found, by firefighters, in the back bedroom of the apartment. She was dead on arrival at the hospital. The cause of the child's death was attributed to smoke inhalation.

In the early morning hours of June 30, 1986, the defendant broke into the K&J Greenhouse, located across the street from the apartment complex, and stole some plants. Although the owner of the greenhouse was uncertain as to whether any gasoline or paint thinner was removed from the greenhouse, the accelerants were on the premises at the time the defendant broke into the greenhouse.

That the fire was arson-related was supported by evidence of the burn patterns in the cement floor of the apartment, the presence of paint thinner in the wood porch of the apartment, and the presence of paint thinner and gasoline in the carpet from the apartment.

Having reviewed the entire record, we are convinced beyond a reasonable doubt that Cynthia Collins was killed while the defendant, being the principal offender, was committing, attempting to commit, or fleeing after committing aggravated arson.

The defendant next contends that the sentence of death was unreliable because of the trial court's consideration of a non-statutory aggravating circumstance in the penalty phase of the trial. The defendant also contends that the death sentence was inappropriate because of the existence of certain mitigating factors.

R.C. 2929.05(A) requires this court to determine whether the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt. Inasmuch as the defendant, by virtue of this assignment of error, has raised the issue of the existence of mitigating factors, we deem it appropriate at this juncture to conduct the independent review mandated by R.C. 2929.05(A).

However, we will first address the defendant's contention that the penalty imposed was unreliable because of the inclusion in the pre-sentence investigation report of excerpts from a letter authored by the defendant wherein he boasted of past crimes and threatened the lives of everyone involved in the present case. The defendant argues that this material was a non-statutory aggravating circumstance considered by the panel in sentencing him to death.

Again, we must indulge in the presumption that the three judge panel considered only the relevant, competent and material evidence in reaching its sentencing verdict. See, State v. Post, supra. We especially do so here in light of the fact that the panel had previously considered the material in question and suppressed it as being irrelevant to the guilt or penalty phases of the trial. We therefore reject the defendant's contention that the penalty was unreliable on this basis.

We now turn to our independent review to determine whether the single aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt.

R.C. 2929.04(B) sets forth the following factors to be considered in mitigation of the death penalty:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation;

(3) Whether at the time of committing the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

The defendant presented three mitigating factors to the trial court, the diminished capacity provision, the youth of the offender provision and the catchall provision of R.C. 2929.04(B)(7), placing emphasis on the defendant's history and background, the existence of personality disorders and the defendant's efforts to rescue Cynthia Collins from the burning apartment.

Regarding the third factor, the defendant presented two psychologists, Drs. Leena Puhakka and William McIntosh as witnesses. The defendant also presented a psychiatrist, Dr. Antoine Demosthene, as a witness.

All three of these witnesses testified that the defendant suffers from borderline personality disorder and anti-social personality disorder, which are characterized, among other symptoms, by impulsive behavior. However, Dr. Puhakka testified that the defendant is capable of exerting a significant degree of control over his impulses. The witnesses agreed that neither personality disorder is a mental disease or defect.

Dr. Puhakka testified that a person with the defendant's personality disorders is capable of conforming to the requirements of the law. She also testified that the defendant, in this case, could appreciate the criminality of his conduct. Dr. Demosthene offered no opinion concerning the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Dr. McIntosh testified that the defendant suffered from diminished capacity to fully weigh the consequences of his conduct. However, he also stated that this aspect of the defendant's personality was indistinguishable from that of most felony offenders. Dr. McIntosh could not express an opinion as to whether the defendant could conform his conduct to the requirements of the law.

The state called Dr. Eugene Hepola, a psychologist and Dr. Thomas Sherman, a psychiatrist. Dr. Hepola testified that the defendant did not suffer from any mental disease or defect which would affect his capacity to conform to the requirements of the law. Dr. Sherman testified that the defendant suffered from borderline personality disorder but that there was no indication of his inability to understand the nature and criminality of an act or of his inability to refrain from doing an act.

Upon review of all the expert testimony offered as to the mental state of the defendant, we believe that the defendant did not lack substantial capacity to appreciate the criminality

of his conduct or to conform his conduct to the requirements of the law. Therefore, we find that the mitigating factor of R.C. 2929.04(B)(3) was not established.

Regarding the fourth factor, the defendant presented evidence that, although chronologically he was 21 years old when the crime was committed, mentally he functions on the level of a child or an adolescent. Dr. Puhakka testified that the defendant functions on the level of a ten year old child. However, the doctor also testified that a child of that age is capable of refraining from the defendant's conduct. Similarly, Dr. Demosthene testified that the defendant functions on the level of a fifteen to eighteen year old.

At the time the crime was committed, the defendant was beyond the age of majority. Upon review of the expert testimony, we conclude that there is no evidence that the defendant lacked the maturity to appreciate the consequences of his conduct. Therefore, we find that the mitigating circumstance of R.C. 2929.04(B)(4) was not established.

Regarding the seventh factor, the defendant presented his father, James Richey, as a witness. The focus of Mr. Richey's testimony concerned the defendant's childhood, adolescent and teen-age years.

The defendant grew up in Scotland, after his father, an American serviceman, married his mother, a native of Scotland. Both of the defendant's parents abused alcohol. In addition, the defendant's parents sometimes had physical altercations in his presence. The defendant's mother did not respect or trust authority figures such as law enforcement officers. She taught the defendant to distrust authority as well.

The defendant's adolescent years were marked by the commission of several juvenile offenses. The defendant's mother terminated efforts at psychological counseling for the defendant after his second juvenile offense.

In 1982, the defendant's family broke up and his father moved back to the United States. The defendant remained in Scotland with his mother, who forced the defendant out of her house in 1982, because of his involvement in other juvenile offenses. Subsequently, the defendant moved to the United States with his father.

The defendant and his father maintained a poor relationship. The primary cause for conflict in the relationship was the defendant's abuse of alcohol and drugs. Ultimately, the defendant's father forced him out of his house, which resulted in one of the defendant's several attempts to commit suicide. His father's subsequent efforts to have the defendant committed to a mental hospital were unsuccessful.

In addition to the foregoing testimony, the defendant presented the expert testimony that he suffers from personality disorders and that these disorders will improve through the natural aging process. The defendant also presented testimony that, despite his personality disorders, he would function well in a structured setting, such as prison.

The defendant also asked the trial court to consider, as a mitigating factor, evidence introduced at trial that, upon arriving at the scene of the fire, he attempted to enter the burning apartment to save the life of Cynthia Collins.

Upon our review of the totality of the evidence concerning the defendant's history and background, as testified to by his father, we find very little in his childhood, adolescent or teen-age experiences that justifies his conduct or lessens his moral culpability for the crime committed. The dynamics of the defendant's family life were not substantially different from the lives of millions of other people, who do not grow up to commit the capital offense of which the defendant has been found guilty. Therefore, we

will afford little weight to this evidence as a mitigating factor.

As regards the probability that the defendant's personality disorders will improve with age, and that he will function well in a prison setting despite the disorders, we find no evidence that the defendant's personality disorders were the cause of his criminal conduct. Therefore, the existence of the disorders or the defendant's potential for improvement do not lessen his moral culpability or diminish the appropriateness of the death penalty. We do not find this evidence to be a mitigating factor.

Likewise, we do not find that any attempt by the defendant to save the life of Cynthia Collins mitigates against the imposition of the death penalty. The defendant himself purposely placed the victim's life in jeopardy and we therefore do not find his subsequent effort to rescue her to be a mitigating factor.

When we place the aggravating circumstance, which was proved beyond a reasonable doubt, against the single mitigating factor regarding the defendant's background, we find that the mitigating factor is not sufficient to overcome the aggravating circumstance. Therefore, we find that the aggravating circumstance, of which the defendant was found guilty, outweighs the single mitigating factor found herein. The defendant's seventh assignment of error is not well taken.

8. "The death sentence in Appellant Richey's case was excessive and disproportionate, thereby resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I of the Ohio Constitution."

Pursuant to R.C. 2929.05(A), the scope of this court's review in determining whether the imposition of the death penalty is appropriate includes a determination as to whether the sentence is disproportionate to that imposed in similar cases. Before proceeding to a determination of proportionality, we will address the defendant's contention that this court, in conducting the proportionality review, should consider all similar Third Appellate District capital cases, including those cases where the death penalty was not imposed.

It is well settled that, for purposes of the proportionality review, we need only look to those capital cases within our geographical jurisdiction in which the death penalty was actually imposed. State v. Steffen (1987), 31 Ohio St. 3d 111, paragraph one of the syllabus. Therefore, we reject the defendant's argument.

This is only the second capital case considered by this court in which the death penalty was imposed. In State v. Spirko (March 6, 1989), Van Wert App. No. 15-84-22, unreported, we found the sentence of death to be appropriate in an aggravated murder case involving the kidnap and murder of an Elgin, Ohio postmistress.

The case sub judice is an aggravated murder-aggravated arson case wherein, the defendant, in the course of committing aggravated arson, caused the death of a defenseless, two year old child, whom he knew was alone and asleep in the apartment at the time he set the fire. Accordingly, we find the death penalty to be neither excessive nor disproportionate to the facts of this case.

The instant case, on its facts, is not similar to State v. Spirko, supra and therefore we are unable to draw any valid conclusions from a comparison of these cases. However, we can say that there is nothing in the Spirko case which would lead us to conclude that the sentence of death is either

excessive or inappropriate in this case. The defendant's eighth assignment of error is not well taken.

9. "The trial court's failure to consider appellant's mitigating evidence in its sentencing determination was contrary to R.C. 2929.04(B)(7), the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The defendant argues that the trial court erred in refusing to consider, as mitigating, certain evidence offered by the defendant in the penalty phase. The evidence which the defendant contends the trial court erroneously rejected was testimony by the defendant's father concerning his history and background, expert testimony concerning the potential for improvement in the defendant's behavior in a structured setting and material in the pre-sentence report concerning the defendant's history of suicide attempts and commitments to mental institutions.

In the separate opinion required by R.C. 2929.03(F), the trial court outlined in considerable detail the evidence which the defendant offered in mitigation. In arguing that the trial court erroneously discounted his mitigating evidence, the defendant cites the language from the court's opinion that "* * * the defendant produced no evidence that rose to the level of a mitigating factor."

In State v. Steffen, supra, at paragraph two of the syllabus, the Supreme Court of Ohio held that:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers mitigating, this does not necessarily mean that the court is required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible

under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight."

Although the trial court is required to consider any evidence presented by the defendant pursuant to R.C. 2929.04(B), it is not required to find that such evidence actually constitutes a mitigating factor. See State v. Stumpf (1987), 32 Ohio St. 3d 95, certiorari denied (1988), U.S. , 108 S. Ct. 1060, rehearing denied (1988), U.S. , 108 S. Ct. 1492 and State v. Depew (1988), 38 Ohio St. 3d 275.

Obviously, the trial court, in the instant case, considered the evidence presented by the defendant but the court found either that the evidence did not mitigate against imposition of the death penalty or was of so little weight that it was outweighed by the aggravating circumstance. This was not error. Accordingly, the defendant's ninth assignment of error is not well taken.

A concomitant aspect of our review in death penalty cases is to determine "* * * whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors." R.C. 2929.05(A). Because the defendant, by virtue of this assignment of error, has raised the issue of the trial court's weighing analysis, we deem it appropriate at this juncture to make the determination required by R.C. 2929.05(A).

"The trial court, when it imposes a sentence of death, shall state in a separate opinion its specific findings as to the existence of any mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why these aggravating circumstances were sufficient to outweigh the mitigating factors." State v. Maurer (1984), 15 Ohio St. 3d 239, paragraph three of the syllabus, certiorari denied (1985), 472 U.S. 1012, rehearing denied (1985), 473 U.S. 924.

"Under R.C. 2929.03(F), a trial court or three judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." State v. Stumpf, supra, paragraph one of the syllabus.

In its sentencing opinion, the trial court outlined in detail all of the evidence offered by the defendant in mitigation. The trial court stated that it considered all of the mitigating factors enumerated in R.C. 2929.04(B), but ultimately focused on factors (3) and (7). Apparently, the trial court found that there was no evidence to support factors (1), (2), (4), (5) and (6) as mitigating against imposition of the death penalty.

In considering the evidence offered in support of R.C. 2929.04(B)(3), the trial court found that there was no evidence that the defendant suffered from a mental disease or defect. The trial court, pursuant to R.C. 2929.04(B)(7), then stated that it had considered whether there was evidence of "any other factors that are relevant to the issue of whether the defendant should be sentenced to death."

The court, having detailed all of the evidence presented in mitigation, found that this evidence did not rise to the level of a mitigating factor and even if the evidence was sufficient to constitute mitigating factors, the aggravating circumstance outweighed any mitigating factors. Thus, it is apparent that the court afforded very little, if any, weight to the evidence offered under R.C. 2929.04(B)(7).

The three judge panel in stating its reasons why the aggravating circumstance outweighed any mitigating factors, cited the "cold, senseless and savage" nature of the defendant's offense. The court therefore found that the defendant's act lacked "even a hint of justification."

In reviewing the sentencing opinion, we find that, although the panel stated that the defendant was found guilty of aggravated murder and of the specification, the court did not specifically reiterate the specification as the aggravating circumstance. However, inasmuch as the failure of the trial court to comply with this aspect of R.C. 2929.03(F) does not go to the trial court's weighing analysis, or our review thereof, we find the error to be harmless. See, State v. Maurer, supra.

Having conducted the review required by R.C. 2929.05(A), we conclude that the trial court considered all of the evidence in mitigation and found that no mitigating factors existed or that the nature and circumstances of the aggravating circumstance substantially outweighed any mitigating effect of evidence presented pursuant to R.C. 2929.04(B)(7). We are therefore satisfied that the trial court properly weighed the aggravating circumstance the defendant was found guilty of committing and the mitigating factors.

10. "It was error to include in appellant's pre-sentence report material suppressed at trial as irrelevant to aggravation and mitigation, victim impact statements and unverified or inaccurate information. The report also introduced for the sentencer's consideration the non-statutory aggravating circumstance of appellant's future dangerousness. This deprived appellant of his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, and undermined the reliability in capital sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The defendant contends that the pre-sentence investigation report which was submitted to the three judge panel in the penalty phase was prejudicial for several reasons.

First, the defendant argues that excerpts from a letter authored by him and included in the report were irrelevant, inflammatory and injected into the penalty phase the non-statutory aggravating circumstance of the defendant's future dangerousness.

As we stated, infra, when we considered his issue under defendant's seventh assignment of error, we indulge in the presumption that the trial court considered only the relevant, competent and material evidence in arriving at its sentencing decision unless it affirmatively appears to the contrary. State v. Post, supra. The defendant has made no affirmative showing that the three judge panel considered this material.

Moreover, we believe that our indulgence in the presumption that the trial court did not consider the material in question is supported by the court's previous suppression of the material as irrelevant to either guilt or mitigation. We find that the defendant was not prejudiced by the inclusion of the material in the pre-sentence report.

The defendant next argues that he was prejudiced by the inclusion of victim impact statements in the pre-sentence report. The material complained of consists of statements as to the pecuniary loss incurred by the mother of the victim, Hope Collins, the owner of the Old Farm Village Apartments and the owner of the K&J Greenhouse.

Here, we refer to the following holding from State v. White (1968), 15 Ohio St. 2d 146, paragraph two of the syllabus:

"The use by the state of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error, but while such error may be cause for reversal because of its prejudicial effect on a jury, it must affirmatively appear that in a bench trial the court relied upon such testimony in

arriving at its verdict in order for such error to be ground for reversal."

More recently in State v. Post, supra, at page 384, the Supreme Court of Ohio held:

"Absent an indication that the panel was influenced by or considered the victim impact evidence in arriving at its decision, the admission of the victim impact statement * * * at the mitigation hearing did not constitute prejudicial error."

In the case at bar, there is nothing in the written opinion by the three judge panel to indicate that the court considered the pecuniary losses caused by the aggravated arson in its sentencing decision. Thus, we conclude that the inclusion of the material in the pre-sentence report does not constitute prejudicial error.

Finally, the defendant contends that he was prejudiced because the pre-sentence report was hastily prepared and not fully verified and therefore may have contained incorrect information.

Having read the report, it is apparent to this court that the information regarding the circumstances surrounding the offense committed is consistent with the record in the case. The remaining information is of a personal nature, from which the defendant, better than anyone else, should be able to identify any incorrect information that prejudiced him. The defendant has not done so.

The fact that the report may have been hastily prepared or not fully verified was not sufficiently grevious to taint the mitigation proceedings. See State v. Glenn (1986), 28 Ohio St. 3d 451, 459, certiorari denied (1987), U.S. , 107 S. Ct. 3219, rehearing denied (1987), U.S. , 108 S.Ct. 18. The defendant's tenth assignment of error is not well taken.

11. "The trial court erred by failing to state its essential factual findings on the record when it overruled appellant's motion to suppress as required by Criminal Rule 12(E), violating his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution."

On December 12, 1986, a hearing was held on the defendant's motions to suppress all statements made by him to the police and other officials, and to suppress several letters authored by the defendant which had been confiscated during his incarceration for the instant offenses. On the day of the hearing, the trial court ruled from the bench and granted the motion to suppress the letters, but denied the motion to suppress the statements.

On January 6, 1987, the trial court filed its judgment entry journalizing its decision. The pertinent portion of the entry was as follows: "Motion to suppress statements is denied." The defendant contends that the trial court erred in failing to state, on the record, its essential findings of fact when overruling the motion to suppress, as required by Crim. R. 12(E).

"An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Williams (1977), 51 Ohio St. 2d 112, paragraph one of the syllabus.

Moreover, it is reversible error for the trial court to not make findings of fact on the record only in situations where it has been requested to do so. State v. Amalik (1986), 31 Ohio App. 3d 33. See also, Bryan v. Knapp (1986), 21 Ohio St. 3d 64.

In the instant case, after judgment was entered overruling the motion to suppress, any error in the court's failure to state

its essential findings could have been corrected upon the defendant's request for a statement of findings. However, the defendant made no request of the trial court. We therefore conclude that the trial court's failure to state its essential findings is not reversible error. Accord, State v. Holden (1985), 23 Ohio App. 3d 5, motion for leave to appeal overruled (June 9, 1985), No. 85-668. The defendant's eleventh assignment of error is not well taken.

12. "The trial court erred in denying appellant's motion to suppress statements. The statements were not obtained in accordance with the rules espoused in Miranda v. Arizona, and violated appellant's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution."

The defendant cites several instances wherein he alleges that he made statements, pursuant to questioning by law enforcement officials, without the benefit of the warnings required under Miranda v. Arizona (1966), 384 U.S. 436.

The first statement was made to Thomas Miller, Chief of Police of Columbus Grove, Ohio, on June 30, 1986. Evidence introduced at the suppression hearing reveals that Chief Miller arrived at the scene of the fire at approximately 4:33 A.M. on June 30, 1986. Because the defendant had been interfering with the firefighters and other rescue operations, Chief Miller placed the defendant in the backseat of his patrol car.

After the fire had been brought under control, the police chief transported the defendant to the police station to begin the initial paperwork related to the fire. Miller testified that his sole reason for interviewing the defendant was because he was the first witness at the scene of the fire. Moreover, Chief Miller testified that the defendant was taken to the police

station simply because it was more convenient to interview the defendant at the station rather than in the police cruiser.

At the police station, Chief Miller did not give the defendant Miranda warnings prior to questioning. However, the defendant was advised, by the police chief, that he was not under arrest. At the suppression hearing, Chief Miller testified that the defendant was free to leave the police station at any time. Moreover, Miller testified that at the time he questioned the defendant, the fire was considered a "normal", non-arson related occurrence and the defendant was not under suspicion.

The procedural safeguards pertinent to the Miranda rule are not required in the absence of a custodial interrogation. Rhode Island v. Innis (1980), 446 U.S. 291. "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Oregon v. Mathiason (1977), 429 U.S. 492. A person is not "in custody" for purposes of receiving Miranda protection where there is no formal arrest or restraint of freedom of movement of the degree associated with formal arrest. Minnesota v. Murphy (1984), 465 U.S. 420.

Applying the foregoing authority to the facts of the instant case, we find that the defendant's statement to Chief Miller was not the product of a "custodial interrogation". At the time the defendant was questioned, he was not under formal arrest and was free to leave the station at will. The fact that the questioning took place at the police station did not require Chief Miller to administer Miranda warnings. Oregon v. Mathiason, supra; State v. Barnes (1986), 25 Ohio St. 3d 203, certiorari denied (1987), 480 U.S. 926.

The next statement, about which the defendant complains, was made to Roy Sargent, Deputy Sheriff of the

Putnam County Sheriff's Department. Deputy Sargent arrested the defendant for the instant offenses on July 1, 1986, at approximately 2:00 P.M. At the time of making the arrest, Sargent administered Miranda warnings to the defendant. Immediately after being arrested, the defendant was taken to the police station and was questioned by Sargent.

The defendant now argues that, because of the lapse in time, between the Miranda warnings given when he was arrested, and the subsequent questioning at the police station, the deputy was required to repeat the Miranda warnings prior to questioning him. We reject the defendant's argument and conclude that the brief passage of tame between arresting the defendant and transporting him to the Sheriff's office for questioning did not require that the Miranda warnings be given again. See United States ex rel. Patton v. Thieret (C.A.7, 1986), 791 F. 2d 543, certiorari denied (1986), 479 U.S. 888; United States ex rel. Henne v. Fike (C.A.7, 1977), 563 F.2d 809, certiorari denied (1978), 434 U.S. 1072.

The defendant next argues that statements which he made to Deputy Mike Ball on July 1, 1986 were obtained in violation of Miranda v. Arizona, supra. Testimony adduced at the suppression hearing reveals that, during the routine booking process, the defendant made spontaneous statements to Deputy Ball, which were not the result of questioning by Ball. Deputy Ball did not administer Miranda warnings to the defendant prior to booking him. However, the record is clear that, on the same day, prior to being booked, the defendant twice had been given Miranda warnings by other law enforcement officials connected with the case.

We find that the defendant's statements to Deputy Ball on July 1, 1986, were voluntary statements made during the normal and routine booking procedure. Hence, the statements were admissible as not being the product of custodial

interrogation. United States v. Menichino (C.A.5, 1974), 497 F.2d 935.

The defendant also objects to the introduction of a statement made to the prosecutor and deputy sheriffs subsequent to his incarceration. On July 3, 1986, the defendant was brought from his cell for questioning. Although, during the previous two days, the defendant twice had been warned of his rights under Miranda, no Miranda warnings were administered to the defendant on this occasion.

However, once interrogation of the defendant commenced, he immediately invoked his rights to remain silent and to speak with an attorney. At that point, questioning of the defendant ceased. The statement that the defendant now complains about is his one-line exclamation, "Go for it", which was made in response to the prosecutor's departing comment that he would see the defendant in court.

We believe that this single utterance by the defendant was a voluntary, nonincriminatory statement. Moreover, the statement was not the product of an "interrogation" by law enforcement officials, as that term has been defined by the Supreme Court of the United States. See Rhode Island v. Innis, supra at page 301. Therefore, introduction of the statement did not violate the defendant's privilege against self-incrimination.

Finally, the defendant objects to the introduction of three statements made to deputy sheriffs on July 2, 1986, August 17, 1986 and November 19, 1986. However, our review of the record reveals that all of the statements in question were the product of conversations initiated by the defendant with the deputies. These conversations, initiated by the defendant, under noncoercive circumstances and not during interrogation, were admissible even though the defendant

was not administered Miranda warnings. State v. Bryson (1970), 22 Ohio St. 2d 224, modified (1972), 408 U.S. 938.

For the foregoing reasons, we find that the trial court did not err in denying the defendant's motion to suppress the statements in question. The defendant's twelfth assignment of error is not well taken.

13. "The trial court's failure to sever count three of the indictment against Appellant Richey prejudiced his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, constituted an abuse of the trial court's discretion and requires reversal of appellant's conviction."

The defendant faced a five-count indictment. Count one contained the capital charge of aggravated murder with one specification. Count three charged the defendant with the breaking and entering of the K&J Greenhouse, located across the street from the Old Farm Village Apartment complex.

The defendant argues that he was prejudiced by the trial court's denial of his motion to sever Count three of the indictment because it permitted the trier of fact to improperly cumulate evidence of the aggravated murder charge and the breaking and entering charge. In essence, the defendant claims that he would not have been found guilty of the capital offense, if he had been tried separately on the breaking and entering charge.

Crim. R. 8(A) provides that two or more offenses may be charged in the same indictment if the offenses charged are "* * * based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." In the instant case, joinder of Count one and Count three in the indictment was

proper as the offenses charged constituted part of a course of criminal conduct.

Crim. R. 14 provides for relief from prejudice which results from the joinder of offenses, even if that joinder is otherwise proper under Crim. R. 8(A). However, a defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced by the joinder. State v. Torres (1981), 66 Ohio St. 2d 340.

The defendant makes a general assertion that he was prejudiced by the trial court's cumulation of the evidence concerning Counts one and three. However, the defendant has not pointed to anything that affirmatively shows that the trial court improperly cumulated the evidence.

Given the fact that the evidence of the charges against the defendant was susceptible to easy segregation by the three judge panel, the fact that the defendant has not made an affirmative showing that the panel improperly cumulated the evidence and the fact that, even without a separate charge, evidence of the breaking and entering and resulting access of the defendant to the accelerants may well have been admissible to show "purpose" in the capital offense in any event, we must conclude that he was not prejudiced by the joinder of the offenses. See, State v. Torres, supra.

Moreover, in our opinion, even if Count three had been severed and all evidence thereof excluded, there still would have been sufficient evidence for the panel to find the defendant guilty of the capital offense beyond a reasonable doubt. The defendant's thirteenth assignment of error is not well taken.

14. "The unmistakable pattern of substantial misconduct during the closing argument of the guilt phase of appellant's trial induced the panel to convict and sentence to death

according to factors which were irrelevant and highly prejudicial. The misconduct violated appellant's constitutional rights to due process, equal protection, fair trial and against cruel and unusual punishment."[[[

The defendant cites several incidents that occurred during the prosecutor's closing argument which he regards as prosecutorial misconduct. Among those incidents were the prosecutor's references to the transcript of a tape-recorded statement given by the defendant when the transcript itself was not admitted into evidence; the prosecutor's characterization of the defendant and his conduct as being sociopathic and psychopathic when no evidence had been introduced during the guilt phase of the defendant's mental condition; explanatory statements regarding the lack of certain evidence surrounding the commission of the capital offense; and the prosecutor's recreation of the final hours of the victim's life.

We would note that the transcript to which the prosecutor referred was an accurate transcription of a tape-recorded statement. The transcript was not introduced, however the tape-recorded statement was admitted into evidence. We also note that similar explanatory comments regarding the evidence to which the defendant now alludes to as being prosecutorial misconduct, were also made by defense counsel in his closing argument.

Some latitude and freedom of expression are permitted for closing argument. See, State v. Apanovitch (1987), 33 Ohio St. 3d 19.

However, assuming the prosecution was more zealous than it should have been in its characterization of the defendant and in recreating the final hours of the victim's life, this is not grounds for reversal unless the conduct resulted in such prejudice to the defendant that it probably

adversely affected the outcome of his trial. The question is not whether statements were made that were unfair, but whether the defendant received an unfair verdict as a result of those comments. Id. at 24 (reaffirming its holding in State v. Maurer, supra that "[t]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives defendant of a fair trial."

In this case, there was sufficient evidence to convict the defendant even if the comments in question had not been made. Therefore, we find that even if some of the comments were inappropriate, they were not so prejudicial as to deny the defendant a fair trial. The defendant's fourteenth assignment of error is not well taken.

15. "The improper introduction of other acts evidence in the guilt phase of appellant's capital trial violated Evid. R. 404(B) and R.C. 2945.59. The misuse of this evidence deprived appellant of the reliability and fairness in a capital trial required by the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution."

The defendant argues that the introduction of testimony regarding his threats on the prosecutor's life and an attempt on the life of his own father was prejudicial error because the testimony was introduced to show that the defendant had a propensity for crime and that he therefore committed the capital crime with which he was charged.

Defense counsel failed to raise any objection during the trial to the foregoing testimony. Failure to object to an alleged error at the time of trial constitutes a waiver of the claim absent a showing of plain error. State v. Wade (1978), 53 Ohio St. 2d 182.

In State v. Long (1978), 53 Ohio St. 2d 91 at page 97, the Supreme Court of Ohio held:

"Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

We do not find the circumstances in the case at bar to be exceptional. The evidence came in through the testimony of deputy sheriffs during their recitation of conversations initiated by the defendant with the deputies while he was incarcerated. In addition to the testimony in question, the deputies also testified as to statements made by the defendant, during these conversations, which were clearly relevant to the case being tried.

Nor do we find that a manifest miscarriage of justice occurred as a result of the testimony in question. Thus, we find no plain error. The defendant's fifteenth assignment of error is not well taken.

16. "The trial court abused its discretion by denying defense counsel's motion to admonish and sequester witnesses. This denial deprived appellant of his right to a fair trial and the right to be free from the infliction of cruel and unusual punishment as required by the Fourteenth and Eighth Amendments respectively."

At the commencement of the guilt phase of the trial, the court ruled that there would be a separation of witnesses. Defense counsel then made an oral motion for the trial court to admonish each witness, after testifying, against discussing their testimony. In addition, defense counsel requested that the court order a sequestration of each witness away from the general public prior to testifying.

The trial court denied the motion. The defendant now contends that the trial court abused its discretion and also deprived him of a fair trial.

We do not find that the trial court abused its discretion in refusing to sequester the witnesses from the general public prior to testifying. It was within the province of cross-examination by defense counsel to elicit from witnesses the fact of whether they had discussed their testimony with other people prior to coming to court.

Similarly, any collusion among the witnesses themselves was also a matter which could also have been tested upon cross-examination. Evidence of collusion thus revealed would go to the credibility of the witnesses, which is a determination for the trier-of-fact.

Moreover, the defendant has only raised the possibility of collusion between witnesses as effecting his right to a fair trial. The defendant has not pointed to any specific instance of collusion that actually had a prejudicial effect on his right to a fair trial. Therefore, we conclude that the defendant was not prejudiced by the trial court's denial of the motion. The defendant's sixteenth assignment of error is not well taken.

17. "The state's failure to record the grand jury proceedings in Appellant Richey's case violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution."

Crim. R. 22, which provides that "[i]n serious offense cases all proceedings shall be recorded", has been construed to apply to grand jury proceedings. See, State v. Grewell (1989), 45 Ohio St. 3d 4. Therefore, grand jury proceedings in felony cases must be recorded. Id. at 9. However, the failure to record grand jury proceedings does not constitute prejudicial error unless the defendant establishes a particularized need for disclosure of grand jury transcripts which outweighs the need to maintain grand jury secrecy. Id.

"Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication * * *."

Grewell, supra at 9, citing State v. Greer (1981), 66 Ohio St. 2d 139, paragraph three of the syllabus.

The question of whether particularized need exists is within the discretion of the trial court. Greer, supra, at paragraph one of the syllabus. The issue cannot be raised on appeal absent a ruling by the trial court. Grewell, supra at 9.

In the trial court, the defendant moved to obtain disclosure of grand jury transcripts claiming a particularized need to avoid unnecessary death qualification voir dire in the event that the grand jury testimony did not present probable cause that the aggravating circumstances could be proven at trial. Without deciding the issue of whether the defendant had established a particularized need, the trial court denied the motion finding it to be moot because the grand jury testimony was not recorded.

Because the defendant subsequently waived his right to a jury trial, on appeal, he has apparently abandoned his claim of a particularized need to avoid unnecessary death qualification voir dire and now claims instead a need for the grand jury transcript to impeach the trial testimony of prosecution witnesses with their allegedly inconsistent grand jury testimony. However, the defendant failed at any time during the trial to assert the particularized need that he now claims. The defendant's omission deprived the trial court of the opportunity to issue a ruling on whether the defendant had established a particularized need for the grand jury testimony and thus whether his right to a fair adjudication

was prejudiced by the unavailability of a grand jury transcript.

Likewise, the defendant's failure to make any showing of particularized need, in the trial court, deprives this court of a record from which we can determine whether his right to a fair adjudication was prejudiced by prosecution witnesses' allegedly inconsistent testimony. The effect of defendant's omission is compounded by his failure to specifically identify anything in the record from which we can reasonably infer that the witnesses' testimony on direct examination was inconsistent with their grand jury testimony and that the defendant therefore was deprived of a fair adjudication.

Under these circumstances, we find that the defendant's failure to assert a particularized need to secure the grand jury testimony, during the trial, waives the issue on appeal. Accordingly, the seventeenth assignment of error is not well taken.

18. "The trial court erred in failing to keep a complete record of all proceedings throughout the guilt and mitigation phases of appellant's trial by allowing unrecorded sidebars, and by failing to have the view of the crime scene recorded. These failures violated appellant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution, Section 10, Article I of the Ohio Constitution, and Section 2929.05 of the Ohio Revised Code."

The defendant first contends that the trial court erred to his prejudice by failing to record sidebar discussions. The defendant argues that the court's failure to record these discussions denies him effective appellate review.

The defendant's contention that, as a defendant in a capital case, he is constitutionally entitled to a "complete, full and unabridged transcript" is correct. State, ex rel. Spirko v. Court of Appeals (1986), 27 Ohio St. 3d 13, 18. However,

the defendant in Spirko, supra, had been denied access to entire transcripts of hearings, such as the arraignment and hearings on motions. Id. at 14. Here, the defendant was provided with a complete transcript of all the proceedings, which contains ten instances where the trial court conducted off-the-record discussions with both counsel.

In addressing a similar issue involving inaudible portions of a transcript in a capital case, the Supreme Court of Ohio in State v. DePew (1988), supra, at page 279, stated that "[t]o hold that appellant has therefore been denied his right to a complete transcript would be highly unjustified unless appellant has clearly demonstrated prejudice resulting from the missing portions."

In the instant case, the defendant does not point out a specific instance where effective appellate review is precluded by the incompleteness of the transcript. The defendant makes only the general assertion that he was deprived of a valuable source of information in pursuing appeals of his death sentence. Given the fact that the defendant has not demonstrated that he was prejudiced by the alleged inadequacy of the record, we conclude that the trial court's failure to record sidebar discussions is not reversible error.

The defendant next contends that he is also denied effective appellate review because the trial court's viewing of the crime scene was unrecorded.

The record is clear that the trial court made a specific inquiry of both counsel concerning any objection to leaving the recorder behind during the viewing of the crime scene. Defense counsel failed to register any objections.

Accordingly, we find no error in the failure of the trial court to record its viewing of the crime scene. The defendant's eighteenth assignment of error is not well taken.

19. "Appellant was denied the effective assistance of counsel in his capital trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution."

The defendant contends that his counsel's failure to object to the admission of certain evidence during trial, failure to request the trial court to state its essential findings on the record upon overruling defendant's motion to suppress and failure to recognize violations of Ohio's multiple counts statute resulted in him being denied effective assistance of counsel.

The Supreme Court of the United States, in Strickland v. Washington (1984), 466 U.S. 668, rehearing denied (1984), 467 U.S. 1267, held that a defendant is entitled to effective assistance of counsel under the Sixth Amendment, and set forth the test for determining whether a defendant has been denied that right:

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction of a death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

The Supreme Court of Ohio addressed the issue in State v. Hamblin (1988), 37 Ohio St. 3d 153, 156 as follows:

"In Ohio, a properly licensed attorney is presumed competent. The appellant bears the burden of proving that his

trial counsel was ineffective. To carry this burden, appellant must show that counsel failed to function as the 'counsel' guaranteed by the Sixth Amendment. Appellant must also demonstrate that the deficient performance prejudiced this defense. To establish prejudice, appellant must show that there is a reasonable probability that but for counsel's mistakes, the result of the trial would have been different. [Citations omitted.]"

In the case at bar, the defendant argues that evidence of his propensity for crime and future dangerousness was erroneously admitted in the guilt and penalty phases of the trial because his counsel failed to object. In addition, the defendant contends that, in the penalty phase, his counsel failed to object to the panel's consideration of a pre-sentence report that was not fully verified.

However, we are not convinced that the admission of evidence of the defendant's propensity for crime, in the guilt phase, resulted in the three judge panel reaching a verdict that it otherwise would not have reached. In fact, after examining all of the evidence, this court finds that the evidence not challenged by defense counsel, if excluded, would not have changed the result of the trial.

As to the defendant's assertion that the admission of evidence, in the penalty phase, concerning his future dangerousness resulted in his being denied effective assistance of counsel, we find no reasonable possibility that, but for the inclusion of the evidence, the outcome of the penalty phase would have been different. We must indulge in the presumption that the three judge panel considered only the competent, relevant and material evidence. State v. Post, supra. The defendant has made no affirmative showing that the trial court considered evidence of his future dangerousness in reaching its sentencing verdict and hence

he has not shown that he was prejudiced by counsel's failure to object to the material in question.

Furthermore, we are not convinced that defense counsel's failure to object to the three judge panel's consideration of the pre-sentence report, which was not fully verified, prejudiced the defendant in the penalty phase. The defendant makes a general assertion that he was prejudiced by the pre-sentence report. However, the defendant does not point to any specific error in the preparation of the report, which if corrected or excluded, through the efforts of defense counsel, would have changed the result of the trial.

The defendant also contends that his counsel's failure to request the trial court to state its essential findings on the record upon overruling the defendant's motion to suppress resulted in his being denied effective assistance of counsel. However, we do not find that, but for counsel's failure to make such a request, the result of the trial would have been different.

Finally, the defendant argues that he was denied effective assistance of counsel as a result of his counsel's failure to recognize violations of Ohio's multiple counts statute, R.C. 2941.25. However, we concluded under Assignment of Error Nos. 1 and 2 that, in this case, multiple sentencing was not precluded by R.C. 2941.25. There can be no claim of ineffective assistance of counsel for failure to object to a matter that is not error.

We are not persuaded that the defendant was denied effective assistance of counsel. The defendant's nineteenth assignment of error is not well taken.

20. "Ohio's mandatory sentencing scheme prevented the three judge panel from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the

United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution."

This assignment of error was reviewed and rejected in State v. Coleman (1988), 37 Ohio St. 3d 286, certiorari denied (1988), U.S. , 109 S. Ct. 250 State v. Zuern (1987), 32 Ohio St. 3d 56, certiorari denied (1988), U.S. , 108 S.Ct. 786, rehearing denied (1988), U.S. , 108 S.Ct. 1252; State v. Buell (1986) 22 Ohio St. 3d 124, certiorari denied (1986), 479 U.S. 871, rehearing denied (1986), 479 U.S. 1000; and State v. Jenkins, supra. The defendant's twentieth assignment of error is not well taken.

21. "The trial court erred in imposing the death sentence on Appellant Richey. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, Ohio Constitution, establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05 do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to Kenneth Richey."

This argument was addressed and rejected in State v. Jenkins, supra; State v. Maurer, supra; State v. Martin (1985), 19 Ohio St. 3d 122, certiorari denied (1986), 474 U.S. 1073, rehearing denied (1986), 475 U.S. 1040; State v. Williams (1986), 23 Ohio St. 3d 16, certiorari denied (1987), 480 U.S. 923, rehearing denied (1987), U.S. , 107 S. Ct. 1966; State v. Glenn, supra; State v. Thompson (1987), 33 Ohio St. 3d 1; and State v. Coleman, supra. The defendant's twenty-first assignment of error is not well taken.

22. "Appellant's right to effective assistance of counsel was violated when the state called as a witness, during its case-in-chief, a defense retained expert."

Prior to trial, defense counsel retained Gregory DuBois, a consulting engineer with CTL Engineering, Inc. as an expert to investigate the origin of the fire which caused the death of Cynthia Collins. Mr. DuBois did not testify for the defense.

However, the defense-retained expert was called to the stand in the defendant's trial, as a witness for the prosecution, during the state's case-in-chief. DuBois testified that he was retained as an expert by the defense, that he had investigated the fire and that, after reviewing the evidence, he agreed that accelerants were used to start the fire.

The defendant now contends that the prosecution should not have been permitted to call DuBois to stand as part of the state's case-in-chief. The defendant argues that the state's use of a defense expert under these circumstances violated his right to effective assistance of counsel.

In support of his argument, the defendant relies heavily upon Hutchinson v. People (Sept. 8, 1987), Colo. Sup. Ct. No. 855C510, unreported, wherein the Colorado Supreme Court held that the prosecution's use of a defense-retained handwriting expert, in the state's case-in-chief against the defendant for forgery, violated the defendant's constitutional right to effective assistance of counsel.

We would first note that the authority relied upon by the defendant is not controlling. Moreover, we are not persuaded by the reasoning of the court in Hutchinson, supra. We would also note that, unlike the defendant in Hutchinson, supra, the defendant, in the case sub judice, did not object, at the time of trial, to the prosecution's use of the defense retained expert.

In State v. Noggle (Oct. 19, 1978), Crawford App. No. 3-89-2, unreported, affirmed sub. nom. Noggle v. Marshall (C.A.6, 1983), 706 F. 2d 1408 (1983) certiorari denied 464 U.S. 1010, this court addressed the issue of whether the prosecution's use of a defense retained psychiatrist, on

rebuttal, violated the defendant's right to effective assistance of counsel.

In State v. Noggle, supra, the defendant pled not guilty and not guilty by reason of insanity to aggravated murder. Counsel for the defense employed two psychiatrists to examine the defendant prior to trial. One psychiatrist was called for the defense, the other was not. After the defense rested, the state, as rebuttal, called the second psychiatrist, a Dr. Resnick, to testify for the state over objection by the defendant. Dr. Resnick testified in great detail as to what the defendant told him during the examination, including the defendant's confession that he stabbed the victim.

In addressing the right to effective assistance of counsel, under these facts, this court concluded:

"* * * [T]here should be, as an incident to the constitutional guarantee of effective counsel, a correlative ability to obtain psychiatric diagnosis and opinion without rendering the defendant's statements to the psychiatrist automatically available to the prosecution, and this requires a privilege arising from the attorney-client relationship protecting such interviews.

"* * *

"We would conclude that as a result of the constitutional guarantee of effective assistance of counsel there is a limited privilege for psychiatric experts retained by the defendant." State v. Noggle, supra, at page 24.

We see a clear distinction between the testimony of an expert witness concerning statements made to him by the defendant or defense counsel and the testimony of an expert witness regarding objectively observed facts.

In the instant case, the defense-retained expert was called by the state for the sole purpose of stating his opinion as to the cause of the fire. Mr. DuBois's opinion was based

entirely upon the reports of other witnesses, photographs of the scene of the fire and reports of the State Fire Marshall's Office. DuBois did not testify concerning any statements made to him by the defendant. Nor can it be said that any of his testimony was the result of communications between the defendant and his counsel. Moreover, there is no indication that Mr. DuBois ever consulted with the defendant.

On these facts, we are persuaded that there was no testimonial communication between the defendant and the witness which effected the defendant's right to effective assistance of counsel. The defendant's twenty-second assignment of error is not well taken.

Therefore, in accordance with foregoing dispositions of defendant's assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

**APPENDIX H**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KENNETH RICHEY,

DEFENDANT-APPELLANT

Case No. 12-87-2

Court of Appeals of Ohio,
Third Appellate District,
Putnam County

December 28, 1989, Decided

MR. RANDALL M. DANA, Ohio Public Defender, MS. JANE PERRY, Ohio Public Defender Commission, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, For Appellee.

SHAW, J., EVANS, P.J. and BRYANT, J., concur.

OPINION

SHAW, J. In addition to our opinion on the twenty-two assignments of error briefed and argued by the defendant in this case, we are also required by R.C. 2929.05(A) to file a separate opinion stating our findings as to whether the

aggravating circumstance the defendant was found guilty of committing outweighs the mitigating factors in this case, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, whether the evidence supports the finding of the aggravating circumstance and whether the sentencing court properly weighed the aggravating circumstance and mitigating factors.

In his Assignment of Error Nos. 7, 8 and 9, the defendant raised issues pertinent to the foregoing determination. Consequently, in addition to addressing the arguments raised by the defendant, under these assignments of error, we also made the detailed findings required by R.C. 2929.05(A). Therefore, in this separate opinion, we will summarize our findings.

In this case, the defendant was charged with one aggravating circumstance, to wit: that he purposely caused the death of Cynthia Collins while committing, attempting to commit, or fleeing immediately after committing aggravated arson in violation of R.C. 2929.02(A)(1).

Under Assignment of Error No. 7, we stated in considerable detail the evidence that supports the finding of the aggravating circumstance. We reaffirm our conclusion that the evidence in the record supports the finding that the defendant ignited a fire in or around the apartment of Hope Collins with full knowledge that Cynthia Collins was alone and asleep in the apartment. We are convinced beyond a reasonable doubt that Cynthia Collins was killed while the defendant was committing aggravated arson.

The defendant presented evidence of three mitigating factors, the diminished capacity provision of R.C. 2929.04(B)(3), the youth of the offender provision of R.C. 2929.04(B)(4) and the catchall provision of R.C. 2929.04(B)(7), placing emphasis on the defendant's history and background, the existence of personality disorders and

the defendant's efforts to rescue Cynthia Collins from the burning apartment.

Under Assignment of Error No. 7, we detailed the evidence presented by the defendant in mitigation against imposition of the death penalty.

We found that the mitigating factors of R.C. 2929.04(B)(3) and (4) were not established. The defendant did not lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The defendant was 21 years old at the time the crime was committed and did not lack the maturity to appreciate the consequences of his conduct.

Regarding evidence of mitigating factors under R.C. 2929.04(B)(7), we did not find the existence of the defendant's personality disorders and his potential for improvement to be a mitigating factor. There was no evidence that the defendant's personality disorders were the cause of his criminal conduct. Therefore the existence of the disorders of the defendant's potential for improvement do not lessen his moral culpability or diminish the appropriateness of the death penalty.

Likewise, we did not find that any attempt by the defendant to rescue Cynthia Collins mitigates against imposition of the death penalty. The defendant himself purposely placed the victim's life in jeopardy and we therefore did not find his subsequent effort to rescue her to be a mitigating factor.

Finally, as regards the evidence concerning the defendant's history and background, we found little in the defendant's experiences that justified his conduct or lessened his moral culpability for the crime committed. The dynamics of the defendant's family life were not substantially different from the lives of millions of other people who do not grow up to commit the capital offense of which the defendant has

been found guilty. Therefore, we afforded little weight to this evidence as a mitigating factor.

When we placed the aggravating circumstance, which was proved beyond a reasonable doubt, against the single mitigating factor regarding the defendant's background, we found that the mitigating factor was outweighed by the aggravating circumstance. We therefore reaffirm our conclusion that the aggravating circumstance, of which the defendant was found guilty, outweighs the single mitigating factor established.

Under Assignment of Error No. 9, we determined that the sentencing court properly weighed the aggravating circumstance and mitigating factors. The three judge panel considered the evidence in mitigation, and the nature and circumstances of the offense in concluding that the single aggravating circumstance outweighed any evidence which arguably could be considered as a mitigating factor. We found nothing improper in the analysis and therefore reaffirm our conclusion that the sentencing court properly weighed the aggravating circumstance and mitigating factors.

This is only the second capital case considered by this court in which the death penalty was imposed. The first death penalty case that we considered, and in which we found the sentence of death to be appropriate, was an aggravated murder-kidnap case. See State v. Spirko (March 6, 1989), Van Wert App. No. 15-84-22, unreported. Consequently, we have no valid precedent to use in determining whether the sentence in this case, involving aggravated murder-aggravated arson, is disproportionate. However, as we noted in our disposition of Assignment of Error No. 8, nothing in the Spirko case would lead us to conclude that the sentence in this case is excessive or inappropriate.

Accordingly, we do not hesitate to reaffirm out conclusion, reached under Assignment of Error No. 8, that the sentence of death is appropriate in this case.

We affirm the sentence of death imposed by the trial court.

Sentence of death affirmed.

**APPENDIX I**

THE STATE OF OHIO,
APPELLEE,

v.

RICHEY,
APPELLANT.

No. 95-374

SUPREME COURT OF OHIO

73 Ohio St. 3d 523; 653 N.E.2d 344

June 21, 1995, Submitted
August 30, 1995, Decided

Appeal from the Court of Appeals for Putnam County, No. 12-87-2.

Appellant, Kenneth T. Richey, was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangering, and sentenced to death in 1987. The court of appeals affirmed the convictions and sentence. *State v. Richey* (Dec. 28, 1989), Putnam App. No. 12-87-2, unreported, 1989 WL 156561. On direct appeal as of right, we also affirmed. *State v. Richey* (1992), 64 Ohio St.3d 353, 595 N.E.2d 915, certiorari denied, *Richey v. Ohio* (1993), 507 U.S. , 113 S.Ct. 1592, 123 L.Ed.2d 157.

In April 1994, Richey filed with the court of appeals an application to reopen his appeal under App.R. 26(B), alleging ineffective assistance of his appellate counsel. The court of appeals denied the application, finding that appellant had

failed to establish good cause for not filing the application to reopen within ninety days from the journalization of the appellate judgment, as required by App.R. 26(B)(1) and (B)(2)(b). The court of appeals also held that appellant's twenty-two proposed assignments of error failed to raise any genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal.

Appellant appeals the denial to this court. Appellant also now submits propositions of law XXIII through XXV, asserting he was denied the effective assistance of appellate counsel in his appeal before this court.

*Daniel R. Gerschutz*, Putnam County Prosecuting Attorney, for appellee.

*Goodwin, Procter & Hoar, Paul E. Nemser* (admitted *pro hac vice*), *Kenneth J. Parsigian* (admitted *pro hac vice*), *Patricia A. Lipoma* and *Lisa M. Tittemore; Porter, Wright, Morris & Arthur* and *Scott E. North*, for appellant.

Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer and Cook, JJ., concur. Wright, J., dissents.

*Per curiam.* We affirm the decision of the court of appeals for the reasons stated in its opinion. Further, we reject appellant's additional propositions of law XXIII through XXV, asserting appellant was denied the effective assistance of counsel before this court in his application for rehearing. Appellant's 1992 appeal to this court was not a first appeal as of right; therefore, he had no constitutional right to counsel, and hence no constitutional right to effective assistance of counsel. See *State v. Buell* (1994), 70 Ohio St.3d 1211, 639 N.E.2d 110.

*Judgment affirmed.*

Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer and Cook, JJ., concur.

Wright, J., dissents.

Wright, J., dissenting.

I dissent for several reasons, most of which are included within Justice Herbert R. Brown's dissent in *State v. Richey* (1992), 64 Ohio St.3d 353, 373, 595 N.E.2d 915, 931.

**APPENDIX J**

THE COURT OF APPEALS
OF THE THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO
PUTNAM COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE CASE NO. 12-87-2

v.

KENNETH T. REICHEY JOURNAL ENTRY

DEFENDANT-APPELLANT

This cause comes before the court upon the application of defendant, Kenneth T. Richey, for reopening pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d. 60, the memorandum in opposition filed by the State of Ohio and defendant's "notice of supplemental authority."

Defendant's conviction and death sentence were affirmed by opinion and journal entry of this court on December 28, 1989, and by the Ohio Supreme Court on August 12, 1992. See *State v. Richey* (1992), 64 Ohio St.3d 353. Defendant's application for reopening was filed April 15, 1994.

The court finds that defendant's application was not fled within ninety days of the journalization of the appellate judgment as required by App.R. 26(B)(1). The court further finds that defendant's explanation for the delay, that he was represented by the same appellate counsel for the past four years, fails to show good cause for the application being flied

untimely. App.R. 26(B)(l) and 26(B)(2)(b). See, also, *State v. Carter* (1994), 70 Ohio St. 3d 642.

The court further finds that, notwithstanding the fatal procedural defect, the twenty-two assignments of error raised by defendant in his application for reopening fail to raise any genuine issue as to whether defendant was deprived of the effective assistance of counsel on appeal. *Strickland v. Washington* (1984), 466 U.S. 668; App.R. 26(B)(5).

In support of his application, defendant presents affidavits of his prior appellate counsel, Ken Murray and Jane P. Perry, stating that they "did not think of" and "completely missed" the issues raised in the application's assignments of error one through fourteen and, though they raised the claim of ineffective assistance of trial counsel, through "oversight" they missed the particular deficiencies of trial counsel alleged in the application's assignment of errors fifteen and sixteen. The Supreme Court of the United States has long recognized that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. *Engle v. Isaac* (1982), 456 U.S. 107, 102.

Upon our review of the first sixteen assignments of error the court finds that several of the issues were waived at trial, some were precluded by settled law and several are merely restatements of issues addressed by this court and the supreme court on appeal. Clearly, without the benefit of hindsight, counsel could have reasonably decided that they could not add these issues without "burying good arguments *** in a verbal mound made up of strong and weak contentions." See *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, citing *Jones v. Barnes* (1983), 463 U.S. 745, 753.

In regard to assignments of error seventeen through twenty-one of defendant's application, defendant admits that his appellate counsel addressed these issues in the direct appeal, but claims they did so on the basis of an "insufficient and/or incomplete record." Upon our review of the record

and these assignments of error, the court finds no indication that an "insufficient and/or incomplete record" limited the argument or consideration given these issues in the direct appeal.

Finally, defendant asserts by his twenty-second assignment of error that his prior appellate counsel's ability to provide effective representation was undermined by a conflict of interest. By affidavit, Mr. Murray states that he deliberately presented the ineffective assistance of trial counsel claim "in a relatively weak fashion" because his superior at the Ohio Public Defender Commission told him not to raise the ineffective assistance claim. However, due to his resignation from the Public Defender Commission, Mr. Murray was not involved with defendant's appeal after his work on the merit brief. Ms. Perry states in her affidavit that she had no knowledge of the alleged conflict of interest and the record shows that she continued as counsel for the defense in this court and the Ohio Supreme Court.

Upon our review of the record, the court finds nothing to corroborate the allegation that a "conflict of interest" undermined the representation provided defendant in his appeal to this court. Furthermore, in regard to this assignment and all others which rely on the affidavits of Mr. Murray and Ms. Perry, the court finds that the unsubstantiated, self-serving allegations of appellate counsels' own ineffectiveness, without corroborating circumstances in the record, are insufficient to show a genuine issue as to whether defendant was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). To find otherwise would, in essence, license a conceivably deliberate and unethical strategy.

Accordingly, for the reasons set forth above, the court finds that defendant's application for reopening is not well taken and should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that defendant's application for reopening be, and the same hereby is, denied.

/s/ Stephen R. Shaw
/s/ Thomas F. Bryant
/s/ John R. Evans
JUDGES

DATED: January 4, 1995

## APPENDIX K

State v. Richey.

97-2728.

SUPREME COURT OF OHIO

81 Ohio St. 3d 1467; 690 N.E.2d 1287

March 11, 1998, Decided

DISMISSAL, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEAL, IF APPLICABLE, NOT ALLOWED
Moyer, C.J., dissents.

**APPENDIX L**

STATE OF OHIO,
PLAINTIFF-APPELLEE

v.

KENNETH T. RICHEY,
DEFENDANT-APPELLANT

CASE NO. 12-97-7

COURT OF APPEALS OF OHIO,
THIRD APPELLATE DISTRICT,
PUTNAM COUNTY

November 18, 1997, Date of
Judgment Entry

MR. PAUL E. NEMSER, MR. KENNETH J. PARSIGIAN, Attorneys at Law, GOODWIN, PROCTER & HOAR LLP, Boston, MA, MR. SCOTT E. NORTH, Attorney at Law, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, MR. MICHAEL L. COLLYER, Special Assistant Prosecutor, Cleveland, Ohio, For Appellee.

EVANS, P.J. SHAW and BRYANT, JJ., concur.

OPINION

EVANS, P.J. This is an appeal by the petitioner, Kenneth Richey ("Appellant"), from a judgment of the Court of Common Pleas of Putnam County denying his petition for

post conviction relief from judgment without holding an evidentiary hearing.

In January 1987, a three-judge panel convicted Appellant of aggravated murder, aggravated arson, breaking and entering, and child endangerment for the deliberate setting of an apartment fire which resulted in the death of three year old Cynthia Collins. Appellant was sentenced to death on the aggravated murder conviction. He appealed his conviction and sentence to this court, which affirmed the conviction and sentence. This decision was affirmed by the Ohio Supreme Court, see *State v. Richey* (1992), 64 Ohio St. 3d 353, 595 N.E.2d 915, and the United States Supreme Court denied his petition for a writ of certiorari. After having his applications for reopening denied in all three courts, on May 2, 1996, Appellant filed his petition for post-conviction relief, with supporting affidavits, in the court of common pleas. The court denied the petition on March 26, 1997 without an evidentiary hearing and pursuant to the state's motion for summary judgment. On May 14, 1997, the trial court entered its findings of fact and conclusions of law, following which Appellant filed his timely notice of appeal to this court. He has asserted four assignments of error.

FIRST ASSIGNMENT OF ERROR

The trial court erred when it held that Richey's claim of actual innocence--based on new evidence of false scientific testimony--was not cognizable.

During the guilt phase of Appellant's trial the state introduced expert testimony that their tests had shown the presence of accelerants in the items removed from the burned apartment. Along with his petition, Appellant submitted affidavits of various experts who have concluded from their review of the state's testing results that the state's witnesses were incompetent and that the tests failed to establish the presence of accelerants in the materials tested. Therefore,

Appellant asserts that the fire was just as likely to have been caused by accident as by arson. Appellant argues that this "newly discovered evidence" is proof of his innocence. Because execution of an innocent person violates the Constitution, Appellant thus argues that his claim of "actual innocence" is a matter of constitutional proportion which entitles him to raise this issue in a petition for post-conviction relief. However, we find that Appellant's claim of actual innocence is not established by the "newly discovered evidence" offered in support of the claim.

We agree with Appellant that a claim of actual innocence is cognizable in a petition for post conviction relief as a claim of constitutional proportion. As Appellant asserts, execution of an innocent person is clearly not defensible under the Constitution. However, Appellant does not establish a claim of actual innocence based upon his so-called "newly discovered evidence." Even if the trial experts' analyses of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury. Thus, we conclude that Appellant does not present a claim of actual innocence.

We find, therefore, that the trial court did not err in denying a hearing on Appellant's petition for the purpose of introducing "newly discovered evidence" which proved his innocence. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

The trial court erred in holding that Richey's claims are procedurally barred by *res judicata* and because he "amended" his petition without leave.

The trial court found in its decision overruling Appellant's petition that because Appellant first introduced and argued his claim of "actual innocence" in his memorandum in opposition to the state's motion for summary judgment, that claim was barred under R.C. 2953.21(F). That section provides that a petitioner may amend his petition at any time after the state has responded to the petition, but only after obtaining leave of court. Appellant argues that this action by the court was error, because his claim of innocence was not newly introduced at that time, but was presented in the original petition, albeit not in that exact terminology.

We agree with Appellant that this was the action taken by the trial court. We also find that, as Appellant argues, he did not "amend" his petition by his response to the state's motion for summary judgment. Nevertheless, although the trial court was mistaken on this issue, the second assignment of error is not well taken, as the issues raised are *res judicata* under *State v. Perry*.

The doctrine of *res judicata* has been consistently applied to petitions seeking post-conviction relief. Only if the issues raised in the petition must be addressed by reference to evidence *dehors* the record is the court required to hold a hearing and permit the parties to present new evidence. See R.C. 2953.21(E). Moreover, newly presented evidence "must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the petitioner wished to make use of it." *State v. Hawkins*, 1996 Ohio App. LEXIS 2631 (June 26, 1996), Hamilton App. No. C-950130, 1996 WL 348024, unreported. See *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

There is nothing in the record of this case to demonstrate that Appellant could not have sought and presented

testimony of an expert who disagreed with the conclusions of the state's expert witnesses during Appellant's trial. A review by a second expert of an expert's analysis of scientific data presented at trial is not "new evidence." According to Appellant's "newly discovered" expert analyst, the techniques he used for analyzing the data were available at the time of Appellant's trial. Furthermore, the fact that Appellant's newly discovered witnesses disagree with the expert testimony elicited at the trial does not render those experts "incompetent," as alleged by Appellant, nor is incompetency of an expert in and of itself a basis for reversal of a conviction. Rather, the credibility of a witness is an issue for the fact finder at trial. Moreover, the trial record demonstrates that Appellant's defense counsel did introduce evidence to contradict and cast doubt upon the trial witnesses' testimony, including that of the experts called, and upon the reliability of the scientific analyses presented at trial. The record is replete with circumstantial evidence of Appellant's participation in arson the night of the fire in addition to the analysis of the carpet and wood samples. This evidence was presented by a multitude of witnesses to Appellant's behavior the night of the fire, prior to that night, and following the actual event. The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

The trial court erred by holding that Richey failed to present sufficient *prima facie* evidence of ineffective assistance of counsel to warrant an evidentiary hearing.

Appellant claims that his trial counsel's failure to search for and find a scientific expert who would support his position at trial constituted ineffective assistance of counsel. However, as we noted, *supra*, pursuant to *State v. Perry*, this is a claim which was or could have been raised upon direct appeal from the conviction in this case because the fact that

defense counsel failed to call an expert to dispute the state's experts is demonstrated on the trial record. Therefore, we find that this claim is *res judicata*.

Moreover, the failure of counsel to raise alleged errors in the direct appeal of a trial (thus causing them to be considered *res judicata* during post-conviction relief [under] *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104), does not give rise to a meritorious claim of ineffective assistance of counsel when petitioner would not have prevailed upon consideration of the errors had they been actually raised. *State v. Benner* (1988), 40 Ohio St. 3d 301, 315, 533 N.E.2d 701. *State v. Glenn* (Sept. 21, 1990), Portage App. No. 89- P-2090, 1990 WL 136629, unreported. As we stated, Appellant's claim that his constitutional right to a fair trial was violated due to counsel's failure to find an expert who could testify favorably does not render his representation ineffective under *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Whether another expert would have testified such that the results of Appellant's trial would have been different is pure speculation. Additionally, the record does not support Appellant's claim that trial counsel failed to elicit and offer at trial certain mitigating and exculpatory evidence. A review of the record establishes that there was an abundance of such evidence offered. The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in relying on its own personal knowledge in ruling on the Petition.

Appellant contends that the trial judge erroneously relied solely on his own recollection of the events at the sentencing hearing, in that the trial court erroneously considered an incriminating letter written by Appellant while he was in jail pending trial. The basis for Appellant's complaint is that,

despite the introduction of only excerpts of the letter into evidence at trial, the trial judge noted in his decision dismissing Appellant's petition for post conviction relief that the entire letter was before the court when it was originally ruled upon. However, as the court held, there is simply no evidence that the sentencing judges considered anything but the "relevant, competent, and material evidence in arriving at [their] sentencing decision." Following our review of the record, we concur in that conclusion. Further, there is no evidence that the judge, in deciding the issues presented in the post-conviction petition, relied on his "memory," or upon anything but the evidence permitted by R.C. 2953.21(C), which includes affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

Therefore, the fourth assignment of error is overruled.

Having found no error prejudicial to the appellant herein, in any of the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW and BRYANT, JJ., concur.

## APPENDIX M

IN THE COURT OF COMMON PLEAS
PUTNAM COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | CASE NO. CR86-21 |
| | : | |
| Plaintiff/Respondent | : | JUDGE MICHAEL J. |
| v | : | CORRIGAN |
| | : | |
| KENNETH T. RICHEY | : | FINDINGS OF FACT, |
| | : | CONCLUSIONS OF LAW, |
| Defendant/Petitioner. | : | ENTRY DENYING PET- |
| | : | ITION TO VACATE OR |
| | : | SET ASIDE SENTENCE |
| | : | WITHOUT A HEARING |

This matter came before the Court on the Petition to Vacate or Set Aside Sentence with exhibits filed by Petitioner Kenneth Richey, Richey's amended petition filed the day after, the Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment Under R.C. 2953.21(D) filed by Respondent, and Petitioner's Memorandum In Opposition to the State's motion. The Court considered the entire record in case CR86-21, including, but not limited to dockets, records, transcripts of proceedings, trial exhibits and journal entries; the records from the direct appeal in the Third District Court of Appeals in case no. 12-87-2, and the direct appeal to the Supreme Court of Ohio in case no. 90-338, reported at 64 Ohio St.3d 353, decided August 12, 1992. This Court has also considered the arguments made by the parties at a hearing held on March 21, 1997. Based upon all of the above, the Court makes the following findings of fact applicable to all causes of action.

(1) The grand jury of Putnam County, Ohio returned indictment CR86-21, charging Richey with the Aggravated Murder of Cynthia Collins with a death penalty specification under R.C. 2929.04(A)(7). The indictment also charged Richey with one count of aggravated arson, one count of breaking and entering, one count of involuntary manslaughter, and one count of child endangerment.
Indictment CR86-21 was returned on July 10, 1986.

(2) On January 8, 1987, a three judge panel comprised of the Honorable Michael J. Corrigan, the Honorable Donald C. Nugent, and the Honorable Charles D. Abood, found Richey guilty of aggravated murder with the death penalty specification, guilty of aggravated arson, guilty of breaking and entering, and guilty of child endangerment. The count of involuntary manslaughter was dismissed as a lesser-included offense of aggravated murder.

(3) On January 26, 1987, following the presentation of mitigation, the three judge panel imposed the death penalty upon Richey.

(4) The Third District Court of Appeals affirmed the judgment and sentence on December 28, 1989 in case no. 12-87-2.

(5) The Ohio Supreme Court affirmed the judgment and sentence on August12, 1992.

(6) The United States Supreme Court denied certiorari on March 22, 1993.

(7) Richey filed an application for reopening In the Third District Court of Appeals on April 5, 1994.

(8) On January 4, 1995, the Third District Court of Appeals denied Richey's Application for Reopening.

(9) The Ohio Supreme Court affirmed the decision of the Court of Appeals denying the application for reopening on August 30, 1995. The United States Supreme Court denied certiorari on April 1, 1995.

(10) On May 2, 1996, Richey filed a petition to vacate or set aside sentence with attached exhibits.

(11) On May 3, 1996, Richey filed an amended petition to vacate or set aside sentence.

(12) On July 2, 1996, the State of Ohio filed a Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D).

(13) On September 3, 1996, Richey filed a Memorandum in Opposition to the State's Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D).

FIRST CAUSE OF ACTION

The Court makes the following findings of fact for the first cause of action.

(1) This cause of action alleges that the State's experts used unsound scientific principles, which caused them to give false testimony.

(2) Richey does not allege that the prosecutor was aware that the scientific principles used by the State's experts were allegedly unsound.

(3) Richey does not allege that the State's experts

knowingly or purposely lied.

(4) The trial transcript in this case reflects the methodology and scientific principles used by the experts to arrive at their conclusions.

(5) The claims In this cause of action could have been raised at trial.

(6) Nowhere in Richey's Petition to Vacate or Set Aside Sentence does he mention the phrase "actual innocence.", nor Schlup v. Delo (1995), 115 S.Ct. 851, nor Herrera v. Collins (1993), 506 U.S. 390.

(7) In Richey's Memorandum in Opposition to the State's Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D), Richey for the first time argued that his first cause of action includes a constitutional claim of actual innocence.

(8) R.C. 2953.21(F) requires the petitioner to secure leave of court to amend his petition after the prosecutor has responded to the post-conviction petition.

(9) Richey did not seek leave of court to amend his petition.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, this claim could have been raised at Richey's trial, and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Even if this Court could consider the claim, it is not one cognizable in post-conviction litigation because Richey does not claim that the State was aware of its alleged falsity nor does Richey allege that the experts knowingly or purposely bled. State v. Cook (Dec. 29, 1995), Hamilton App. No. C-950090, unreported (collecting cases).

(3) As Richey failed to secure leave of court before attempting to "amend" his petition to include a claim of actual innocence, that claim is not properly before this Court.

(4) Even if the claim were before this Court, it is not cognizable. State v. Lott (Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, and 66390, unreported.

SECOND CAUSE OF ACTION

The Court makes the following findings of fact for the second cause of action.

(1) This cause of action alleges that trial counsel were ineffective because a defense retained expert was allegedly incompetent by failing to find that the fire was not caused by arson.

* * *

(2) Once again, even in this proceeding, Richey fails to attack Mr. DuBois' qualifications.

(3) In light of Mr. DuBois' qualifications and Richey's failure to attack them, this Court finds that Mr. DuBois was a properly qualified expert.

(4) Richey does not allege that trial counsel were aware that Mr. DuBois, the defense-retained expert, was incompetent; the only fact that Richey relies upon is that Mr. DuBois did not do his own testing of the State's evidence.

(5) In connection with his post-conviction petition, Richey hired two experts to evaluate the State's evidence.

(6) Despite the fact that Richey argues that Mr. DuBois was incompetent for failing to do his own testing, Richey's experts nevertheless reached their conclusions without doing any testing.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to allege facts, which if proved, would entitle him to relief, as the Constitution does not guarantee criminal defendants the right to the effective assistance of expert witnesses. Wayne v. Murray (CA. 4) (per curiam), 884 F.2d 765, 766-67, cert. denied (1989), 492 U.S. 936; see also, Pruett v. Thompson (C.A. 4), 996 F.2d 1560, 1573 n.12, cert. denied (1993), 114 S.Ct. 487; Alley v. State (Tenn. Crim. App. 1994), 882 S.W.2d 810, 817.

(2) Trial counsel had no duty to "shop around" for an expert to contradict the State's experts.

(3) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel.

(4) In particular, the record in this case rebuts Richey's

claim; trial counsel acted reasonably in retaining an expert that this Court has found to be qualified.

(5) Richey has tailed to produce evidence to demonstrate that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment (as applied to the states through the Fourteenth Amendment) when he relied on Mr. DuBois.

(6) Richey's failure to demonstrate deficient performance means that this Court may dismiss this claim without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

THIRD CAUSE OF ACTION

The Court makes the following findings of fact for the third cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to adequately investigate the case by not searching for and finding a competent expert to rebut the State's arson evidence.

(2) This cause of action further alleges that trial counsel was ineffective for listing a defense expert on discovery even after learning that the defense expert would not testify favorably to Petitioner.

(3) This cause of action is based upon facts that appeared in the record on direct appeal.

(4) The record and exhibits attached to Richey's petition demonstrate that trial counsel retained an independent expert who was the vice president and a principal of

CTL Engineering, Inc., an engineering consulting firm in Columbus, Ohio. (Transcript, p. 820).

(5) Richey does not allege that Mr. DuBois was not qualified to render an expert opinion.

(6) Richey does not allege any facts in existence at the time of trial that should have led counsel to believe that Mr. DuBois was incompetent.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to allege facts, which if proved, would entitle him to relief. See, Second Cause of Action; Poyner v. Murray (C.A.. 4, 1992), 964 F.2d 1404, 1419; Roach v. Martin (C.A. 4), 757 F.2d 1463, 1477, cert. denied (1985), 474 U.S. 865; State v. Maurer (April 25, 1988), Stark App. No. CA-7253, unreported; State v. Combs (1992), 100 Ohio App.3d 90, 102-104; State v. Loft (Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, and 66390, unreported.

(2) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) As Petitioners' claim is based upon facts appear in the record, or the mere absence of which supported Petitioner's claim, this claim could have been raised in Petitioner's direct appeal. State vs. Nichols. (1993), 66 0. S. 3d 431. It is therefore now res judicata. State vs.

Perry (1967), 10 0.5. 2d 175.

## FOURTH CAUSE OF ACTION

The Court makes the following findings of fact for the fourth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to present an expert to rebut the State's experts' testimony that the fire was caused by arson.

(2) Richey alleges that the mere failure to call an expert was Ineffective assistance of counsel.

(3) The record demonstrates that Richey's trial counsel retained an expert to examine the State's evidence of arson.

(4) The record also demonstrates that Richey's retained expert agreed with the State's conclusion that the fire was caused by arson.

(5) The record further shows that Richey's trial counsel adopted a strategy that attacked the State's evidence concerning the identity of the arsonist.

(6) Neither of Richey's trial counsel represented Richey in his direct appeals.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in

Richey's direct appeal. State v. Nicholas (1993), 66 Ohio St.3d 431, 436; State v. Mahoney (Dec. 27, 1995), Lorain App. No. 94CA006022, unreported. It is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Even if this cause of action were not waived due to *res judicata,* this Court would alternatively find that the record confirms that trial counsel employed a reasonable trial strategy by attacking the evidence of identity (see Transcript, pp. 1028-1057, and pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular). Richey's current suggestion of another strategy does not render counsel ineffective. State v. Post (1987), 32 Ohio St.3d 380, 387-89; State v. Coleman (Mar. 17, 1993), Hamilton App. No. C.900811, unreported.

FIFTH CAUSE OF ACTION

The Court makes the following findings of fact for the fifth cause of action.

(1) This cause of action alleges that appellate counsel were ineffective for failing to raise certain claims listed In Richey's Application for Reopening, attached to the petition to vacate or set aside sentence as Exhibit 5.

(2) Richey does not allege the existence of facts dehors the record in support of this claim nor does he attach any evidentiary material in support.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings. State v. Murnahan (1992), 63 Ohio St.3d 60, paragraph one of the syllabus.

## SIXTH CAUSE OF ACTION

The Court makes the following findings of fact for the sixth cause of action.

(1) This cause of action alleges that trial counsel were ineffective at the guilt and penalty phases of Richey's trial.

(2) Richey's claim is based upon facts appearing In the trial record.

(3) Richey does not allege the existence of facts de hors the record in support of this cause of action.

(4) This claim could have been raised in Richey's direct appeal.

(5) Neither of Richey's trial counsel represented him on appeal.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in Richey's direct appeal and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

SEVENTH CAUSE OF ACTION

The Court makes the following findings of fact for the seventh cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to raise an alleged plea offer either as prosecutorial misconduct or as mitigation evidence at the penalty phase.

(2) Richey attached no documentary evidence or affidavits in support of his naked assertion that such a plea offer was ever made.

(3) After the State pointed this out In its motion, Richey secured a supplemental affidavit from William F. Kluge, one of Richey's trial counsel.

(4) In the undated affidavit (which contains crossed-out and handwritten notes that lack a signature or initials), Kluge states that an unnamed prosecutor offered Richey a plea bargain that would have allowed Richey to avoid the death penalty.

(5) R.C. 2953.21(F) requires the petitioner to secure leave of court to amend his petition after the prosecutor has responded to the post-conviction petition.

(6) Richey did not seek leave of court to amend his

petition.

(7) Richey fails to cite any authority for the admissibility of an alleged plea offer or that a prosecutor's offer to a lesser-included offense is prosecutorial misconduct.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey failed to secure leave of court before amending his petition to include an affidavit from trial counsel, the supplemental affidavit is not properly before this Court

(2) Richey failed to submit evidentiary documents or affidavits containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Alternatively, even if Richey's allegations were true, his proposed evidence would have been inadmissible under Ohio law. Ohio Evid. R. 410; State v. Sneed (May 22, 1989), Stark App. No. CA-6976, unreported, affirmed (1992), 63 Ohio St.3d 3, 16-17, cert. denied (1993), 507 U.S. 983. Trial counsel were not ineffective in failing to seek admission of inadmissible evidence.

## EIGHTH CAUSE OF ACTION

The Court makes the following findings of fact for the eighth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to elicit testimony on four different topics from a witness who testified at trial.

(2) Of the four additional topics, neither Richey nor the witness alleges that counsel knew about the witness' knowledge of two of the topics (concerning Richey's threats and Richey's mood).

(3) With respect to testimony concerning Richey's threats to burn "A Building," the witness' trial testimony conflicts with her affidavit in support of Richey's petition.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St,3d 36, 38-39.

(2) The record confirms that trial counsel employed a reasonable trial strategy by attacking the evidence of identity (see Transcript, pp. 1028-1057, and pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular). Richey's current suggestion of another strategy, wherein the defense would have attacked the two year-old victim and explained why the smoke detector was detached, is simply an alternative strategy, which does not render counsel ineffective. State v. Post (1987), 32 Ohio St.3d 380, 387-89; State v. Coleman (Mar. 17, 1993), Hamilton App. No. C.900811, unreported.

## NINTH CAUSE OF ACTION

The Court makes the following findings of fact for the ninth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to include the entire letter that Richey wrote to his friend in Scotland or to secure an affidavit from "Gogs" to the effect that he had not been killed by Richey.

(2) The trial court had before it the entire letter when considering Richey's pretrial motion to suppress it.

(3) Richey neither alleges nor attaches affidavits or documents to prove that trial counsel had any way of finding "Gogs" or that Richey informed counsel who "Gogs" was.

(4) The letter does not contain a statement that Richey killed "Gogs."

(5) The record in this case is devoid of any evidence to show that the trial court relied on the letter in sentencing Richey to death.

(6) In his direct appeal, Richey claimed error in the introduction of excerpts from the letter in the pre-sentence investigation report.

(7) The court of appeals and the Ohio Supreme Court held that the usual presumption that the trial court considered only the relevant, competent and material evidence in arriving at its sentencing decision unless it affirmatively appears to the contrary, applies in this

case.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in Richey's direct appeal, and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Richey fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Even if Richey's claim were not waived for the above procedural reasons, this Court would hold that a trial court is presumed to consider only relevant, competent, material evidence.

(4) The three judge panel did not consider the letter in its deliberations, and therefore Richey was not prejudiced.

IT IS SO ORDERED.

/s/ Michael J. Corrigan
MICHAEL J. CORRIGAN, JUDGE
5-12-97

## APPENDIX N

Ohio Rev. Code Ann. 2903.01. Aggravated murder.

[as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981]

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division

(B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

Supreme Court, U.S.
SEP 2 - 2005
OFFICE OF THE CLERK

No. 05-101

IN THE
# Supreme Court of the United States

MARGARET BRADSHAW, WARDEN,

*Petitioner,*

v.

KENNETH T. RICHEY,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly concluded that the state failed to prove each element of aggravated felony murder beyond a reasonable doubt in Richey's case when the statute then contained language requiring that the state prove the defendant "specifically intended to cause the death of the person killed" and the state conceded that the defendant did not intend to cause the death of the person killed?

2. Whether this Court should assume the Court of Appeals failed to follow AEDPA when it cited the appropriate legal standard, cited the decision of the highest state court on the merits, and concluded that the state court decision was "unreasonable"?

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O.R.C. § 2903.01(D).....*passim*

## INTRODUCTION

Based on a long-since amended version of Ohio's aggravated felony murder statute, which then required proof that the defendant "specifically intended to cause the death of the person killed," the Court of Appeals reversed Kenneth Richey's conviction on a transferred intent theory and set aside his death sentence because (1) the state had admitted at trial that he had no such intent, and (2) the Ohio Supreme Court had declined to answer a certified question about how to interpret that seemingly unambiguous language. The Court of Appeals also applied the long-standing test of *Strickland v. Washington* to the unique facts of this case to overturn the conviction on the independent ground that Richey received constitutionally ineffective assistance of counsel. Because the Court of Appeals' interpretation of a defunct version of an Ohio statute and its highly fact specific application of the familiar *Strickland* test will not affect any future case, and there is no split in the Circuits or any other important legal or policy reason to review this one-off case, the petition for certiorari should be denied.

Richey's death sentence resulted from a conviction under an aggravated felony murder statute that used to contain language requiring the factfinder to determine whether the accused "specifically intended to cause the death of the person killed." O.R.C. § 2903.01(B) and (D) (1981) (emphasis added). This language was amended out of the statute seven years ago, but when Richey was tried, it arguably precluded conviction for aggravated felony murder on a theory of transferred intent. Since the state had charged Richey only with aggravated felony murder, had tried him only on a theory of transferred intent, and had conceded that he did not intend to cause the death of the person who died, Richey is uniquely situated to argue that his conviction was based on a failure to prove an element of the offense. And

Richey pressed that argument throughout post-conviction proceedings. In the court of appeals he contended that (1) the particular statutory language indeed precluded his conviction based on transferred intent and (2) even if, as the state contended, the Ohio Supreme Court in deciding Richey's direct appeal had implicitly approved transferred intent as an available theory for aggravated felony murder, that would have been an impermissibly retroactive application of the statute in violation of due process.

Contrary to the state's implications, the court of appeals did not run roughshod over state court power to define the elements of state crimes. Before Richey's direct appeal, there was no Ohio decision ruling that transferred intent was an available theory under O.R.C. § 2903.01(B), and the state cites none. Indeed, Richey is the only person ever convicted on a transferred intent theory under that statute. In his direct appeal, Richey's counsel did not argue that transferred intent was unavailable under O.R.C. § 2903.01(B), nor did he cite the critical language of O.R.C. § 2903.01(D). Although the Ohio Supreme Court mentioned transferred intent in discussing the sufficiency of the evidence, it did not decide that the theory was available under O.R.C. § 2903.01(B), nor did it consider the express language of section (D). The Ohio Supreme Court cited only cases under a different aggravated murder provision, O.R.C. § 2903.01(A) (premeditated murder).

On post-conviction, the Sixth Circuit did not rush to interpret O.R.C. § 2903.01(B). It certified the relevant state law questions to the Ohio Supreme Court, but that court declined to answer them. Lacking further guidance from the Ohio courts, the court of appeals then ruled that Richey's conviction for aggravated felony murder was invalid on alternative grounds: After careful review of the particular statutory language and applicable Ohio case law, the court ruled that a transferred intent theory was not permissible under

the aggravated felony murder statute applicable in Richey's case, which expressly required proof that a defendant "specifically intended to cause the death of the person killed." In the alternative, even if the Ohio Supreme Court opinion in Richey's direct appeal could be read to have sanctioned use of a transferred intent theory to convict Richey, that would have been an impermissible retroactive application of a new and unexpected interpretation of the statute. These alternative rulings applying a long-ago amended statute to the specific circumstances of Richey's case do not raise any principle of law worthy of this Court's consideration.

The court of appeals also reversed Richey's conviction on the alternative and independent ground that Richey's trial counsel was ineffective in the handling of expert testimony, particularly the development of a "defense" expert witness who ultimately testified for the state. This was simply a straightforward application of the familiar *Strickland v. Washington* standard to the specific facts–multiple lapses by Richey's trial counsel and the role that the testimony of various experts played in Richey's case. Although the state argues that the Sixth Circuit failed to apply the appropriate standard under AEDPA, the court's opinion consistently cites the appropriate legal standards of cause and prejudice, cites the state court's decision, analyzes the facts, and decides whether the state court ruling was unreasonable. AEDPA requires no more. Finally, having not raised the issue below, the state now complains that the court of appeals relied on facts not considered by the state courts. Yet the facts in question were developed in discovery in federal court–some of it discovery taken by the state–after Richey had sought and been denied such discovery in the state courts. The court of appeals' reliance on such facts is thus entirely appropriate. In sum, the court of appeals' ruling on ineffective assistance of trial counsel offers no basis for granting a writ of certiorari.

## STATEMENT OF THE CASE

A. *There Was No Evidence that Richey Intended to Kill Cynthia Collins.*

Kenneth Richey was convicted of starting a fire that resulted in the death of Cynthia Collins, a two-year old girl. The state has never argued that Richey intended to kill Cynthia - in fact, during the direct appeal of Richey's case, the state conceded that it had presented no such evidence. Rather, the state's own trial witnesses admitted that on the night of the fire, Richey was drunk and passed out in the bushes, and then later risked his life when he repeatedly tried to enter the burning apartment in a vain attempt to save Cynthia. Eventually, Richey had to be restrained by police and fire officials for his own safety. Richey's conviction for aggravated felony murder was based solely on a theory of transferred intent–that he intended to kill two people who were not injured in the fire.

B. *The State Used Unreliable Scientific Evidence to Obtain Richey's Conviction.*

The conclusion that the cause of the fire was arson was based on unreliable scientific evidence. During the morning after the fire, the investigators initially concluded that the fire was started by a faulty electric fan. Still, because a fatality had occurred, the State Fire Marshal was called in to investigate. Although the Fire Marshal later testified that he came to believe the fire could be the result of arson during that day, he took no samples for testing by the Ohio Arson Crime Laboratory ("OACL"). Moreover, he failed to maintain the integrity of the fire scene, instead allowing the apartment manager to clean out the apartment. By the end of the day after the fire, no samples had been taken and the apartment had been gutted. Everything, including the carpet the state would later sample and test, was removed to the county landfill.

As the investigation progressed, and focused on Richey, the state determined that it would have materials tested by the OACL for ignitable liquids. The state obtained Richey's clothing from the day of the fire. The tests of Richey's clothing and his boots revealed no traces of any ignitable liquid. The state also obtained samples from the carpet and the wooden deck of the apartment. The carpet was sampled after it had been removed from the apartment, taken to the county landfill, found by sheriff's deputies at the landfill, and brought back to the sheriff's department, where it was laid out in the parking lot no further than 40 feet from gasoline pumps. The samples from the wooden deck were taken nearly three weeks after the apartment had been released. No control samples were ever taken or tested.

The OACL concluded that three samples contained ignitable liquids - one sample from the carpet had gasoline and two (one each from the carpet and the deck) contained paint thinner. All other samples were negative for ignitable liquids. But, as the state's own witnesses admitted during discovery in the federal habeas action, the OACL's methods were never peer-reviewed or published, and in fact, contradicted the results obtained when the generally accepted methods were applied. The Fire Marshal dismissed any concern about the chain of custody issues with the carpet because the carpet sample and the sample from the deck supposedly revealed the same paint thinner.

Although Richey's attorney hired an "expert," L. Gregory Dubois, Dubois's investigation involved no more than talking with the members of the OACL. This "investigation" was further hampered by the fact that DuBois had little training (two two-day courses) in arson investigation and those courses were taught by members of the OACL. He thus had no basis for knowing that the state's methodology was idiosyncratic and differed from generally accepted

methods. Not surprisingly, given this investigation (which was both limited to ten hours and started late due to the actions of counsel), Mr. DuBois eventually agreed with the state. Although he reported that conclusion to Richey's counsel, counsel knew none of the details of the "investigation" – he never asked or even obtained a written report.

DuBois did, however, testify at trial. Through other mistakes, Richey's counsel identified DuBois as a potential trial witness. When he indicated that DuBois would not, in fact, be called, the state accurately read between the lines and subpoenaed DuBois. Although DuBois requested assistance from Richey's counsel in fighting the subpoena, counsel allowed DuBois to testify (without objection) that he agreed with the state's conclusion. Rather than cross-examine DuBois, Richey's counsel then reserved the right to call DuBois himself.

With this uncontroverted (but unreliable) scientific evidence in the record, the three-judge panel (Richey had waived his right to trial by jury at the urging of his counsel) convicted Richey of aggravated felony murder in violation of O.R.C. § 2903.01(B), among other crimes. After a further hearing, Richey was sentenced to death.

C. *The State Courts Refused Richey's Request for Discovery and an Evidentiary Hearing During Post-Conviction Proceedings.*

Following his direct appeals (in which the Ohio Supreme Court affirmed his sentence of death by a 4-3 vote), Richey sought post-conviction relief in the Ohio state courts. As part of his petition, Richey attached the affidavits of two experts, Professor L.P. Custer and Dr. Andrew Armstrong. These experts, in fire reconstruction and forensic chemistry, for the first time identified the scientific flaws in the state's unreliable evidence in support of the arson and aggravated